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AUTHORITIES CITED

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1 Moore, Federal Practice, Sec. 0.304 — 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, AND ALBERT J. DOIG, *Petitioners*

v.

ANGUS J. DEPINTO, AND JAMES P. DONOHUE, AS TRUSTEE IN BANKRUPTCY FOR THE ESTATE OF ANGUS J. DEPINTO, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on February 24, 1967, insofar as said judgment disallowed interest from the date the damages were sustained on October 18, 1957 and authorized interest only from the date of entry of the third judgment entered herein on June 28, 1965.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the district judge (R. 257, 259-260) allowing interest from October 18, 1957 is unreported and is printed in Appendix A hereto, infra,

p. 1a. The opinion of the circuit court of appeals, printed in Appendix B hereto, infra, p. 6a, is reported in_____ F.2d_____.

JURISDICTION

The judgment of the circuit court of appeals was entered on February 24, 1967, Appendix B, infra, p. 32a, and rehearing was denied to respondents on March 29, 1967. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Whether a district court, under the authority of *Concordia Ins. Co. v. School Dist. No. 98*, 282 U.S. 545 and *Miller v. Robertson*, 266 U.S. 258, has the discretion, in the absence of an authoritative state decision to the contrary, to allow interest as an element of damages, even in a case of unliquidated damages, when necessary in order to arrive at fair compensation?

Whether *Erie Railroad v. Tompkins*, 304 U.S. 64, is an erroneous interpretation of the Constitution and should be overruled?

STATEMENT

This litigation involves the efforts of a California stockholder of an Arizona stock life insurance corporation to recover for such corporation, Provident Security Life Insurance Company, the sum of $314,794.19 of cash, bonds and notes taken from the corporation on October 18, 1957 as a result of a "fraudulent scheme"[1] resulting from the breach of fiduciary duty and negligence of its directors. Jurisdiction was vested in the district court under 28 U.S.C. § 1332.

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[1]The opinion of the circuit court of appeals herein, infra, p. 17a.

On June 16, 1965 a general verdict of a jury was returned against respondent DePinto in the sum of $314,794.19.[2]

Since petitioners and respondent had stipulated in a pretrial order and in statements to the district court that the issue of from what date interest would run was one to be decided by the district court, the latter ruled with respect thereto on June 28, 1965 that:

> "Generally interest is not allowable upon unliquidated damages but may be allowed when necessary to provide fair compensation for damages sustained. *Miller v. Robertson*, 266 U.S. 258 (1924). In my opinion all items of damage in the verdict against DePinto were liquidated damages because from the commencement of the action to and including the presentation of evidence in the latest trial, the amount of such damage items has been uncontroverted, fixed or readily determinable. 47 C.J.S., Interest § 19, p. 30. The $166,498.66 item in the verdict against DePinto represents cash or its equivalent and was in a fixed amount at the time it was transferred to Kelly. Likewise, the amounts totaling $148,295.53 for notes, bonds and mortgages transferred to Kelly were either fixed or readily ascertainable at the time they were transferred to Kelly as evidenced by the fact that Kelly, with the advice of expert tax counsel, reported receiving such total sum for these items in his income tax return for the year in which they were received.
>
> Assuming some part of the damages awarded in the verdict against DePinto was unliquidated, under the particular facts of this case fair compensation to those damaged by DePinto's negligence and the ends of justice require the allowance of interest. In the

[2] The said judgment was the third consecutive judgment in the amount of $314,794.19 entered against respondent DePinto. The first was entered June 21, 1960 while the second was entered May 15, 1962.

absence of an authoritative state decision to the contrary, interest may be assessed in order to arrive at fair compensation. *Miller v. Robertson, supra; Concordia Ins. Co. v. School Dist. No. 98,* 282 U.S. 545 (1931). The rule in Arizona in regard to allowing interest on unliquidated damages is not clear. In *Schwartz v. Schweren,* 336 P.2d 144, and *Arizona Eastern R.R. Co. v. Head,* 244 P. 1057, in which three earlier cases allowing interest on unliquidated damages were expressly overruled, the Arizona Supreme Court failed to overrule, impliedly or otherwise, *Zeckendorf v. Steinfeld,* 138 P. 1022 (1914), expressly allowing interest on a recovery in a stockholders' derivative action for wrongful conversion of money and property."

Thus, on June 28, 1965 the district court awarded interest from October 18, 1957, the date when the $314,794.19 was taken.

The circuit court of appeals affirmed the judgment for $314,794.19 based on the general verdict of the jury, but it reversed the district court as to its allowance of interest from October 18, 1957 and modified the judgment to provide that interest shall run only from the entry of judgment on June 28, 1965. The opinion of the court of appeals stated:

"DePinto argues that the trial court erred by including, in the judgment, interest at the rate of six per cent per annum from October 18, 1957 until payment. He argues that since the judgment is based on an unliquidated claim or negligence and breach of fiduciary duty, interest may be imposed only from the entry of the judgment.

We agree. It is not here contended that DePinto benefited from the transaction of October 18, 1957, or that any Arizona statute authorizes the award of interest from the date of the tortious act. Under these circumstances, the Arizona rule permits interest on

an unliquidated claim only from the date of judgment. See *Schwartz v. Schwerin*, 85 Ariz. 242, 336 P. 2d 144, 149; *Cf. Feighner v. Clarke*, 2 Ariz. App. 286, 408 P.2d 219, 222. While *Schwartz* involved a claim for attorneys' fees on a quantum meruit basis, we think the Arizona court *would apply* the same rule with regard to a claim such as that prosecuted against DePinto." (Italics supplied)

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with applicable decisions of this court. In *Concordia Ins. Co. v. School District No. 98*, 282 U.S. 545, this Court, citing *Miller v. Robertson*, 266 U.S. 243, held at pages 554-555:

> "... *In the absence* of an *authoritative* state decision *to the contrary*, there was nothing in either (statute) which required the trial court in rendering its judgment to depart from the rule in respect of the allowance of interest which this court had recognized, namely, that, even in the case of unliquidated damages, 'when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages.' *Miller v. Robertson*, 266 U.S. 243, 257-259, and cases cited. . . ." (Italics supplied)

Here the court of appeals expressly acknowledged that in Arizona there was an absence of an authoritative decision to the contrary. It did so by preceding its citation to *Schwartz v. Schwerin, supra*, by the signal "See", and by its subsequent statement that:

> "... While *Schwartz* involved a claim for attorneys' fees on a quantum meruit basis, we think the Arizona court *would apply* the same rule with regard to a claim such as that presecuted against DePinto." (Italics supplied)

That is, the court of appeals recognized that presently

there is no authoritative Arizona decision to the contrary when it stated what it thought the Arizona court "would apply" as the rule in the future. It made a judgment as to what it thought the Arizona Supreme Court would rule in a case such as this one because there was no authoritative Arizona decision to the contrary now.

Hence, there being no authoritative Arizona decision to the contrary, the district court had the discretion, even assuming as did the court of appeals that this was a case involving unliquidated damages, to include interest as an element of damages when necessary to arrive at a fair compensation.

2. The decision of the court below is in conflict with the decision of the Fourth Circuit Court of Appeals in *United States Fire Ins. Co. v. Wooten*, 4 Cir., 71 F.2d 580, 584.

3. Assuming that there did exist an authoritative Arizona decision prohibiting interest in the instant case, reliance thereon by the court of appeals rather than on federal decisions to the contrary rests on the continuing validity of *Erie Railroad v. Tompkins*, 304 U.S. 64. However, *Erie Railroad v. Tompkins, supra*, is an erroneous interpretation of the Constitution which should be overruled. II Crosskey, Politics And The Constitution, 914-916, 933. The question is an important one, and argument on the point of constitutional law decided in *Erie Railroad v. Tompkins, supra*, which was not heard in that case, should now be heard for the first time. I Moore, Federal Practice § 0.304 at 3047-3048; II Crosskey, *supra* at 916. If *Erie* is not overruled, the rational development of a federal common law, required by both the imperatives and realities of American life in this century, will continue to be frustrated.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted. Should the Court agree that there is no authoritative Arizona decision to the contrary with respect to the allowance of interest by the district court, then an order should be entered summarily reversing the decision of the court of appeals insofar as it modified the judgment of the district court and allowed interest only from the date of entry of judgment on June 28, 1965 rather than from the date when the $314,794.19 was taken on October 18, 1957.

Respectfully submitted.

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Civil 2974
Phoenix

ALBERT J. DOIG, on behalf of himself and all other shareholders of Provident Security Life Insurance Company, *Plaintiff*,

v.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, UNITED SECURITY LIFE, ANGUS J. DEPINTO, CHARLES WESLEY DUHAME AND GUY PETER DUHAME THE Co-Executors of the ESTATE OF ELMER W. DUHAME, DECEASED, FRANCIS I. SABO, EDWIN B. PEGRAM and HJALMER B. LANDOE, *Defendants*.

Memorandum Decision and Order

Defendant DePinto has moved for limitation in the amount of any judgment which may be entered upon the $314,794.19 jury verdict rendered against him June 16, 1965. The motion was argued June 19, 1965 and raises the following questions:

1. Whether the sum of $100,000 to be received on approval of settlement with defendants Duhame must be credited on the amount of the verdict against defendant DePinto.

2. Whether the amount of judgment against DePinto must be reduced (1) by that fraction of the total outstanding United Security Life stock released or surrendered by United Security Investment Company in connection with the merger of United Security Life and Provident Life; or (2) by the certificates of participation

based on Duhame stock to be cancelled in the pending settlement.

3. Whether a judgment on the verdict against defendant DePinto should bear interest from a date prior to the date of entry of judgment.

4. Whether judgment against defendant DePinto must be limited to $308,000 by reason of judgments in such amount entered against other joint tortfeasors.

Prompt ruling on the motion raising the above enumerated questions is desired by all concerned and therefore, while the argument of counsel, all memoranda and cases cited therein have been carefully reviewed and considered, no attempt will be made to present herein an exhaustive or detailed analysis of all factors involved in the decision stated herein. Brief comment will be made only as to some primary grounds of the decision.

Under the facts and applicable law, in my opinion, DePinto should not be credited with any part of the $100,000 Duhame settlement, which the court has allocated to claimed items other than those comprising the $314,794.19 verdict against DePinto. At the time the original complaint was filed, plaintiff Gorsuch was a stockholder of United Security Life and had full capacity to commence this action. The intervention of plaintiff Doig authorized by the Court of Appeals, in no way affected the representative status of either Gorsuch or Doig or the basis of claimed liability or the amounts of damages sought. Any contentions of either Gorsuch or Doig relating to basis of liability or to items of damage arising from such liability, were available for assertion by plaintiffs during the pretrial proceedings leading to the entry of the pretrial order made and entered June 18, 1965. Rule 21, F. R. Civ.P. Assuming, as DePinto

vigorously asserts, that only a single cause of action with various items of claimed damage has been alleged, the statute of limitation was tolled by the filing of the Gorsuch complaint and permission to enlarge the amount of damages sought prior to the entry of the pretrial order depended solely on reasonable notice to the adverse parties. Indisputably such notice was provided during the pretrial proceedings resulting in the trial and verdict against DePinto.

The surrender of the participation rights, acquired by the Duhames through ownership of United Security Life stock, is provided as a part of the consideration for the settlement covenants. This should not be treated or considered as partial restitution applicable to the verdict against DePinto, even if the court's allocation of the proceeds of the Duhame settlement be invalid.

As to cancellation in the merger transaction of United Security Life stock held by American United Security Investment Company, inasmuch as wrongdoers secured control of such stock through negligence of DePinto and manipulated it for their own purposes and gain both prior and subsequent to the commencement of this action, it would be unjust and inequitable to reduce the amount of judgment against DePinto by reason of such stock cancellation. With all the uncertainties and expenses involved in recovery of damages in this litigation, the possibility is extremely remote if not nonexistent that any damaged stockholder of United Security Life will receive more than the amount of damage actually sustained. *Perlman v. Feldman*, 219 F.2d 173 (2d Cir. 1955), upon which defendant principally relies, and other cases cited in support of his contentions are not in point.

Generally, interest is not allowable upon unliquidated

damages but may be allowed when necessary to provide fair compensation for damage sustained. *Miller v. Robertson*, 266 U.S. 258 (1924). In my opinion all items of damage in the verdict against DePinto were liquidated damages because from the commencement of the action to and including the presentation of evidence in the latest trial, the amount of such damage items has been uncontroverted, fixed or readily determinable. 47 C.J.S., Interest §19, p. 30. The $166,498.66 item in the verdict against DePinto represents cash or equivalent and was in a fixed amount at the time it was transferred to Kelly. Likewise, the amounts totalling $148,295.53 for notes, bonds and mortgages transferred to Kelly were either fixed or readily ascertainable at the time they were transferred to Kelly as evidenced by the fact that Kelly, with the advice of expert tax counsel, reported receiving such total sum for these items in his income tax return for the year in which they were received.

Assuming some part of the damages awarded in the verdict against DePinto was unliquidated, under the particular facts of this case fair compensation to those damaged by DePinto's negligence and the ends of justice require the allowance of interest. In the absence of an authoritative state decision to the contrary, interest may be assessed in order to arrive at fair compensation. *Miller v. Robertson*, supra; *Concordia Ins. Co. v. School Dist. No. 98*, 282 U.S. 545 (1931). The rule in Arizona in regard to allowing interest on unliquidated damages is not clear. In *Schwartz v. Schweren*, 336 P.2d 144, and *Arizona Eastern R.R. Co. v. Head*, 244 P. 1057, in which three earlier cases allowing interest on unliquidated damages were expressly overruled, the Arizona Supreme Court failed to overrule, impliedly or otherwise, *Zeken-*

dorf v. Steinfeld, 138 P. 1022 (1914), expressly allowing interest on a recovery in a stockholders' derivative action for wrongful conversion of money and property.

In my view, damages should not be limited as to DePinto because of the stipulated judgments entered against J. E. and L. N. Kelly, Dunn, Jenkins, Croydon and Ballantyne. Such wholly unsatisfied judgments were based on evidence presented in a former trial and their entry in no way affected the claims against DePinto on which the verdict was based.

Accordingly, the motion of defendant DePinto for limitation of judgment is denied in all particulars and the form of judgment on the verdict proposed by plaintiff is approved and forwarded herewith to the clerk for immediate entry. Exceptions allowed.

Dated this 24th day of June, 1965.

GEO. H. BOLDT
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,553

[February 24, 1967]

ANGUS J. DEPINTO, *Appellant*, and JAMES P. DONOHUE, as TRUSTEE IN BANKRUPTCY FOR THE ESTATE OF ANGUS J. DEPINTO, *Intervenor-Appellant*,

vs.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG, *Appellees*.

Appeal from the United States District Court for the District of Arizona

Before: BARNES, HAMLEY and JERTBERG, Circuit Judges. HAMLEY, Circuit Judge:

This stockholder's derivative action, based on diversity of citizenship, was originally brought on behalf of United Security Life (United), an Arizona stock insurance corporation, by John S. Gorsuch, a citizen of Ohio. The defendants were Angus J. DePinto, Edwin B. Pegram, Francis I. Sabo, Hjalmar B. Landoe, Elmer W. Duhame, together with eight other personal defendants and three companies in addition to United. With regard to DePinto and certain other defendants, damages in the sum of $447,633.70 were sought, including an item for $314,794.19, based on a transaction which occurred on October 18, 1957, to be described below.

After commencement of the action, but prior to trial, United merged with Provident Security Life Insurance

Company (Provident). However, neither Provident nor a stockholder of that company was made a party to the action. The case was tried to a jury which returned a general verdict for plaintiffs in the sum of $20,000 against Pegram, Sabo, Landoe and Vernon E. Niesz. The jury also returned special verdicts in which it exonerated DePinto and Duhame of liability. As to them the jury found, among other things, that they had not breached any then existing fiduciary duty to United nor, as directors of United, acted in a negligent manner, proximately causing loss to United with respect to the transfer of the assets in question.

The trial court considered the verdicts to be advisory only. The court determined that the verdicts were not supported by the evidence, issued its own findings of fact and conclusions of law, and entered a joint and several judgment in favor of United against twelve of the personal defendants, in amounts ranging from $308,000 to $314,794.19. The award against DePinto was for $314,794.19. In the alternative, and on the assumption that the defendants were entitled to a jury trial, the trial court granted plaintiffs' motions for directed verdicts in the same amounts as it had allowed on the basis of its own findings of fact.

DePinto, Pegram, Sabo, Landoe and Duhame, effectuated appeals to this court. We reversed and remanded for further proceedings on the ground that, by reason of the merger of United into Provident, Gorsuch, as a stockholder in United, lost his capacity to maintain this derivative action, and United lost its capacity to be sued and its capacity, as the real party in interest, to obtain a judgment. *Niesz v. Gorsuch*, 9 Cir., 295 F.2d 909 (1961).

Upon remand, Provident was joined as a plaintiff and

was realigned by the trial court as a defendant. The trial court allowed Albert J. Doig, a former stockholder of United and a then-existing stockholder of Provident, to intervene as a party plaintiff. Provident and Doig filed complaints in intervention in which, on behalf of Provident, they sought damages against DePinto, Pegram, Sabo, Landoe and Duhame and several others, in the amount of $314,794.19. The allegations in support of these claims were generally similar to those of the amended complaint and pretrial order in the original Gorsuch suit. The five named defendants filed answers joining issue on the allegations of the complaint and raising certain affirmative defenses, which plaintiffs contested. No further testimony was taken on the merits of the controversy.

The trial court re-adopted its original findings of fact and reaffirmed its original decision. The court specifically held that DePinto, Landoe, Sabo, Pegram and Duhame had been guilty of gross negligence and that all of them, except Landoe, had breached fiduciary duties in connection with the diversion of United's funds. Supplemental findings and conclusions of law were entered, together with a final judgment in favor of Provident and against the same twelve personal defendants, in the same amounts as in the case of the original judgment. Alternatively, as in the case of the original judgment, this second judgment also rested on directed verdicts which were entered in favor of plaintiff.

DePinto, Landoe, Sabo, Pegram and Duhame appealed. We again reversed and remanded for a new trial, holding that the defendants were entitled to a jury trial, and that, considering the alternative basis for the judgment, the Seventh Amendment forbids an award of damages in excess of a jury verdict, not consented to by the defend-

ants. *DePinto v. Provident Security Life Insurance Company*, 9 Cir., 323 F.2d 826 (1963).

Following the second remand, there were three important developments before the case proceeded to another jury trial. One of these was the entry of a comprehensive pretrial order which superseded the pleadings. Among other things, this order contains a lengthy statement of admitted facts, a detailed list of the contentions of the respective parties,[1] and a restatement of plaintiff's claims against the various parties. With regard to DePinto and several other named defendants, a total claim of $553,353.63 was asserted, itemized as follows:

(1) $177,863.84 for damages sustained by United between June 30, 1956 and October 18, 1957;

(2) $314,794.19 for damages sustained by United

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[1] In its instructions to the jury, the trial court summarized plaintiffs' contentions, as follows:

"The particular acts or omissions on the part of the defendant DePinto, which plaintiffs allege occurred and amounted to negligence or breach of fiduciary duty are as follows: Acceptance of the office of director without intending to discharge the duties and responsibilities of director; delegating or relinquishing his responsibilities as a director to Kelly; failing to attend directors' meetings; failure to examine minutes, records and transactions and documents of the corporation; failure to keep advised by reasonable inquiry as to important transactions of the corporation, and particularly as to the transactions in question resulting in the transfer to Kelly of corporate assets; failure to investigate and to require measures for protection of the corporation with respect to conditions and transactions potentially harmful to the corporation and stockholders when such were brought to his attention or of which he should have learned in the exercise of reasonable care, and failure to exercise reasonable care to assure that adequate funds, property, and security be obtained by the corporation in return for the transfer to James E. Kelly of substantial assets of United Security Life."

on October 18, 1957, by reason of a transfer of assets as described below; and

(3) $60,695.60 for damages sustained by United between October 19, 1957 and June, 1959.

A second pretrial development was the agreement by executors of the estate of Duhame, deceased, to pay Provident the sum of $100,000 in consideration for a covenant not to sue. The trial court ordered that this sum be allocated to the $177,863.84 claim referred to above, and withdrew this claim from the case. The estate of Duhame was thereby dropped as a defendant. The third pretrial development was the action of the trial court, at the request of plaintiff Doig, and over the objection of DePinto, in severing the cause as to the remaining defendants, and ordering that the case proceed to trial against DePinto as the sole defendant.

It would appear, from an examination of the record, that the $60,695.60 claim against DePinto was also dropped before the case reached the jury. This is also indicated by the fact that, in its instructions to the jury, the trial court made reference only to the $314,794.19 claim. The jury returned a verdict in favor of Provident and against DePinto in that sum and on June 28, 1965, judgment was entered on the verdict. DePinto then took the present appeal.[2]

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[2] In addition to the instant appeal and the two other appeals referred to above, the subject matter of this litigation has spawned several other lawsuits, some of a collateral nature, which have reached this court since the Gorsuch suit was filed on November 4, 1958. See *Mauser v. United Security Life*, 9 Cir., 267 F.2d 3 (1959); *Mauser v. United Security Life*, No. 16261, now pending on a second appeal; *Provident Security Life Insurance Company v. Gorsuch*, 9 Cir., 323 F.2d 839 (1963); *In re Doig*, No. 20460, order of November 2, 1965, unreported; *Gorsuch v. Fireman's Fund Insurance Company*, 9 Cir., 360 F.2d 23 (1966). Additionally, *DePinto v. Provident Security Life*

Subsequent to the institution of this appeal, DePinto was adjudicated bankrupt and James P. Donohue was appointed as Trustee in Bankruptcy. An order was subsequently entered in this court permitting the Trustee to intervene in this appeal. DePinto and the Trustee have identical interests on this appeal, and have filed joint briefs. In referring, below, to DePinto's contentions and arguments, we have also included the Trustee's identical contentions and arguments.

The damages awarded by the trial court were intended to reimburse Provident for the loss sustained by its predecessor, United, in connection with a transfer of assets from United to American Security Investment Company (American), in exchange for 30,800 shares of American's assertedly worthless shares. DePinto was a director of United until immediately prior to the transfer in question.

He contends on this appeal that the undisputed evidence discloses that any loss which may have been sustained by United as the result of its exchange of assets for stock in American was not proximately caused or contributed to by any act or omission of DePinto as a director of United. Accordingly, he argues that the trial court erred in denying his motion for a directed verdict, made at the close of all of the evidence, and his motion for judgment notwithstanding the verdict.

We now state the salient facts as the jury could have found them on the basis of the evidence received at the trial.

Insurance Company, No. 20308, and *DePinto v. Provident Security Life Insurance Company*, No. 20656, consolidated for disposition in this court, are being decided in another opinion filed today.

In 1947, DePinto, a practicing physician with substantial investment interests, met James E. Kelly, one of the defendants in the original Gorsuch action. The two became friends and business associates. DePinto worked with and assisted Kelly in promoting Life Underwriters, Inc. (Underwriters), which was formed on June 16, 1952. Kelly was the president and DePinto a director of that company.

On November 21, 1952, Kelly organized United and held office as a director and officer of United from its inception until July, 1956. Although DePinto was not involved in organizing United, he soon learned that Underwriters had become the exclusive operating management and sales agent for United.

Before DePinto became officially connected with United, he attended a March 29, 1955 meeting of its directors, where he heard complaints about Kelly's management of United. On October 14, 1955, DePinto, responding to a request by Kelly, became a director of United.

He was not, however, an active director. At no time during his term as a director of United did he make a telephone call to United's office to obtain information concerning that company's financial condition. DePinto was not aware that United sustained losses in 1955, 1956, and up to October 18, 1957. He did not know who were the officers of United from July 18, 1956 to October 18, 1957.

Although Kelly resigned as president and director of United on July 18, 1956, DePinto did not become aware of this until October 18, 1957. On several occasions he signed the minutes of the directors' meetings without reading them. On two occasions when he was not in

attendance, he signed minutes which recited that he was present in person.

In the fall of 1957, Kelly decided to sell his controlling stock interest in United. About October 13 or 14, 1957, he suggested to DePinto that in view of the imminent sale of Kelly's stock, DePinto should resign as a director. During this conversation Kelly told DePinto that the purchasers of Kelly's stock in United would gain control of United, but the names of the purchasers were not then disclosed. DePinto did not inquire as to the details of the plan or how it would affect United.

Late on the afternoon of October 17, 1957, American was organized, with Sabo, Pegram, Landoe, Roslyn B. Croydon, John D. Ballantyne and Niesz as the incorporators and directors. On October 18, 1957, Kelly agreed in writing to sell 35,149.89 shares of United stock to American for $325,136.48. At 3:30 p.m. that afternoon, a meeting of the board of directors of American was held. The minutes of that meeting recite that Croydon reported that negotiations had been completed for the acquisition of approximately forty percent of the shares of United, "representing working control," to be paid for partly in cash and partly in asests which could be acquired from United in payment of Class A shares of American.

The directors of American thereupon adopted the four resolutions noted in the margin.[3] As indicated by these

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[3] These resolutions were summarized in appellant's opening brief as follows:

"(a) That American sell to United 30,800 class A common shares of American for a consideration of $308,000, consisting of the assets referred to and described as items 1 through 6 in the United minutes of October 18, 1957, and hereinabove quoted from Exhibit 5H;

"(b) That American sell to United 4,200 shares of its

resolutions, American had arranged to sell to United 35,000 Class A common shares of American stock. The resolutions by American also indicate that in part payment for the 35,149.89 shares of United which Kelly was selling to American, Kelly was to receive the assets of United which Ameircan had acquired in payment for American stock.

A meeting of the board of directors of United was held at 4:00 p.m. on October 18, 1957. At that meeting, with directors DePinto, N. J. Dunn and J. L. Jenkins in attendance, a resolution was adopted accepting the resignations of A. Thomas Duncan, Patrick J. Kelly, E. Hartley Brown, T. J. Flaherty and Spence Reese, as directors of United. This resolution further provided that Niesz, Ballantyne, Croydon, Sabo, Pegram and Harvey T. Goss be elected as directors of United.

A second meeting of United's directors was held at 4:15 p.m. on that day, with only four of the directors (Niesz, Ballantyne, Croydon and Goss) in attendance. Three of these (Niesz, Ballantyne and Croydon) were directors of American and had participated in American's board meeting held at 3:30 p.m. earlier that afternoon.

The minutes of the 4:15 p.m. meeting of United first recite that Dunn, Jenkins and DePinto had previously

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class A common stock for the sum of $42,000, to be paid in cash on or before February 1, 1958;

"(c) That American accept the offer of James E. Kelly to sell 35,149.89 shares of United stock to American for $9.25 a share, and that American pay Kelly therefor by transferring to him the abovementioned assets of United, plus additional cash in the amount of $17,136.48;

"(d) That American accept the offer of United Family Guild to sell 3,650 common shares of United to American at $9.25 a share, payable in cash."

tendered their resignations as directors, and record the adoption of a motion accepting these resignations. According to the minutes, two resolutions were then adopted, the effect of which was to subscribe for 35,000 shares of Class A common shares of American at ten dollars per share. All but 4,200 of these shares were to be purchased immediately for a total consideration of $308,000, consisting of United's secured and unsecured promissory notes, bonds, certificates of deposit and cash.

On the day these transactions took place, American did not have a permit from the Securities Division of the Arizona Corporation Commission authorizing the issuance of shares of its non-voting common stock to United. At this time both Kelly and Croydon knew that Kelly was to be paid with $308,000 in assets of United for his sale to American of his stock in United. United was in a deficit condition on October 17, 1957. The 30,800 shares of American which were sold to United on October 18, 1957, apparently had no fair market value, which resulted in increasing United's existing deficit by $308,000.

In arguing that the undisputed evidence discloses that any loss which may have been sustained by United was not proximately caused or contributed to by any act or omission of DePinto as a director of United, DePinto does not refer to the numerous charges set out against him in the pretrial order, or as summarized in the instructions to the jury. Instead, he refers to two counts of the Doig complaint. Count VI of that complaint charges that DePinto "caused" United to transfer $314,-794.19 to American, and that he and others breached their fiduciary duties by "permitting" United to enter into the agreement with American. Count VII of that complaint charges that DePinto and others "negligently"

transferred control of United to the Niesz group which "looted" United.

Based on this formulation of the charges against him, DePinto first asserts that his resignation as a director of United was accepted by United's board of directors before the new board adopted the resolution authorizing the transfer of United's assets to American. DePinto argues that since he was not a director of United when this resolution was passed, he had no opportunity or authority to oppose the adoption of that resolution and therefore could not have "caused" or "permitted" the transfer of United's assets to American as charged in Count VI.

DePinto also argues that, contrary to the Count VII charge, there is no evidence to indicate that he negligently participated in a transfer of control of United to the Niesz group, nor that this negligence was a proximate cause of United's loss. Such negligence could be shown, he asserts, only if there is evidence to indicate that, had he made an investigation, he would have discovered that a member of the Niesz group was otherwise than a reputable and respected business or professional man. DePinto contends there is no such evidence. Thus, as to the Count VII charges, DePinto does not reach the question of proximate cause.

The jury verdict represents a finding that a proximate cause of United's loss on October 18, 1957, was DePinto's negligence in failing to keep himself informed concerning United's affairs, in failing to determine whether the new group would obtain control of United in a manner which would prejudice that company, and in failing to take effective action to thwart the plan which, upon a reasonable investigation, would have been shown to be

contrary to the best interests of United. The verdict does not represent a finding that a proximate cause of United's loss was negligence on his part in failing to investigate the reputation of the proposed new directors before DePinto tendered his own resignation as a director. No such contention was advanced by plaintiffs,[4] and no evidence was produced by plaintiffs tending to prove such a contention.

According to the evidence, DePinto was aware of complaints against Kelly's management of Underwriters, an associated company. He knew that he was uninformed about the financial affairs of United. He was aware of the seeming haste with which the plan to transfer control of United from Kelly to the Niesz group was executed. He was chargeable with knowing that United was then in a deficit condition. He knew that Kelly and others had not told him the details of the proposed transaction.

The jury could have found, on the basis of these and other circumstances that, in the exercise of reasonable care and in the fulfillment of his fiduciary duties as a director of United, DePinto should have made a reasonable effort to ascertain whether the proposed shift in control would be inimical to the best interests of United. The jury could have further found that a reasonable investigation by DePinto would have revealed that United stood to lose. All that was needed to expose the fraudulent scheme was for DePinto to ascertain that part of the transaction was for United to acquire 30,800 shares of American for a price of $314,794.19 in United assets, and to discover how much the 30,800 shares of American were worth. He would at least have learned

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[4] See note 1.

that these shares of American, in existence just one day, were of doubtful value.

The jury could also have found that, armed with such information, it would have been DePinto's duty to decline Kelly's request that he resign as a director. Continuing as a director, the jury could have found, would have enabled DePinto actively to oppose the proposal before the board and, if necessary, draw the matter to the attention of stockholders and policy holders of United, and to the attention of state regulatory officials. The jury could have found that DePinto's failure to make a reasonable investigation as to whether the ultimate plan would adversely affect United, his resignation from the board of directors in compliance with Kelly's request and without having made such an investigation, and his failure, as a member of the board of United, to fight for the best interests of United, considered together, constituted negligence and a breach of fiduciary duty and was a proximate cause of the loss sustained by United as a result of the October 18, 1957 transaction.

We therefore conclude that the evidence was sufficient to warrant a jury finding against DePinto on the negligence, breach of fiduciary duty, and proximate cause issues raised by what DePinto states to be the controlling charges against him—those set forth in Counts VI and VII of the Doig complaint. It follows that the trial court did not err in denying the motions for a directed verdict, and for judgment notwithstanding the verdict, made on the ground that the evidence was inadequate in this regard.

DePinto next contends that there is no competent evidence on the amount of loss or damage sustained by

United as a result of the October 18, 1957 transaction. Accordingly, he urges that the jury verdict was necessarily the result of speculation upon the part of the jury and his motion for judgment notwithstanding the verdict should therefore have been granted.

It is undisputed that, on October 18, 1957, United transferred to American, cash in the amount of $6,794.19, and other assets of United having a face value of $308,000, for which United received 30,800 shares of American common stock. In its instructions to the jury the trial court stated that, in computing damages, the value of the American stock received by United, as disclosed by the evidence, should be deducted from the jury's findings as to the value of the assets transferred by United. In view of the verdict, the jury presumably determined that the assets transferred by United to American were worth $314,794.19, and that the 30,800 shares of American stock received by United were valueless. DePinto argues that there is no competent evidence that United's transferred assets were worth $314,794.19, nor that the 30,800 shares of American stock received by United were valueless.

There was some evidence tending to indicate that the assets of United, transferred to American, were worth less than $314,794.19, and that the 30,800 shares of American stock received by United were not entirely valuless. However, there was also substantial evidence in favor of plaintiffs in both respects and the jury was entitled to find in accordance therewith. The trial court did not err in holding that the evidence as to damages was not so deficient as to require the granting of DePinto's motion for a judgment notwithstanding the verdict.

DePinto contends that the trial court erred in admit-

ting certain evidence over his objection. Considerable evidence was received pertaining to DePinto's activities prior to the transaction on October 18, 1957, pertaining principally to his record as a director of Underwriters, the complaints heard by him at a meeting of the board of United concerning Kelly's management of that company, DePinto's failure to attend board meetings of United, his lack of knowledge concerning Kelly's resignation as an officer and director of United, and DePinto's general failure to inform himself concerning United's financial condition. DePinto argues that all this evidence is immaterial on the issue of whether any act or omission of DePinto was a proximate cause of the loss to United occasioned by the transaction of October 18, 1957.

In our view all this evidence is relevant to the question of whether DePinto was sufficiently put on notice so that he should have investigated the proposal effectuated on October 18, 1957.

Over DePinto's objection, the trial court allowed into evidence a report of an examination of the affairs of United for the year 1958 made by Guy L. Hammett, an examiner for the Insurance Department of the State of Arizona. DePinto contends that the report is hearsay and not admissable as an official document. In support of this view, he cites *Olender v. United States*, 9 Cir., 210 F.2d 795, where it was held that, to be admissable as an official document, the facts stated in the document must have been within the personal knowledge and observation of the recording official or his subordinates. DePinto presumably contends that the report in question contains statements not within the personal knowledge of Hammett or his subordinates.

There is no factual basis for this argument since Hammett testified that the document in question was pre-

pared on the basis of an examination made by himself and another examiner of the agency. Moreover, the second paragraph of 28 U.S.C. § 1732 (1964), providing for the introduction in evidence of records made in the regular course of business, expressly provides that where certain essentials, not here questioned, are met, all other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight " . . . but such circumstances shall not affect its admissibility." See *LaPorte v. United States*, 9 Cir., 300 F.2d 878, 881.

We have examined DePinto's additional contentions concerning the admission of items of evidence over his objection and find them to be without merit.

DePinto argues that the trial court erred in upholding plaintiff's objections to several lines of questioning of some of DePinto's witnesses on direct examination. The witnesses in question were Kelly, Croydon, Eugene Tompane, Niesz, Sabo, James C. Gregory and Landoe. DePinto also asserts that the trial court erred in rejecting DePinto's offer to read into evidence certain "Admitted Facts," as set out in the pretrial order. He argues that these "Admitted Facts," together with the proffered testimony referred to above, give a substantially complete picture of the activities of the Niesz group on and prior to October 18, 1957, with respect to the formation of American and its acquisition of United stock from Kelly. This evidence, DePinto contends, discloses that the Niesz group had no intention of looting United.[5]

[5] DePinto contends that this proffered evidence reveals that each member of the Niesz group was acting pursuant to advice of counsel; that the Director of Insurance and the Director of the Securities Division of the Arizona Corporation Commission had been consulted; that the group mistakenly, but in good faith, thought their plan could be implemented by mortgages

DePinto argues that if he had made an investigation of the facts and circumstances surrounding the transaction of October 18, 1957, he would presumably have learned of these background circumstances. He questions how the jury could determine whether DePinto's failure to investigate the circumstances surrounding the transaction of October 18, 1957, was or was not a proximate cause of United's loss without knowing all the facts which such an investigation would have revealed. With the whole picture before it, DePinto contends, the jury might well have concluded that a prudent director would not have refrained from participating in the election of the Niesz group to the board of directors of United.

The testimony in question of Kelly, Croydon, Niesz and Sabo, was first received at the original Gorsuch trial, at which time there were twelve personal defendants in addition to DePinto, and three defendant corporations in addition to United. The claims asserted against some of these other defendants were entirely different from the claims asserted then, and now, against DePinto. For example, in the original Gorsuch trial, it was charged that Sabo, Pegram, Croydon, Ballantyne and Niesz, all members of the board of directors of American, were also members of the board of directors of United on October 18, 1957.[6] Accordingly, it was urged that they were accountable to United for all their acts

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furnished through Eugene Tompane pursuant to approved Certificates of Contribution and the Sabo was making a $115,000 investment in the program; and that when United merged with Provident the latter company secured, by means of Certificates of Contribution, mortgages having a value of over $200,000 which were then carried on the books of Provident as assets and part of its surplus.

[6] That some of these defendants denied this in the Gorsuch suit is immaterial for present purposes.

arising from their association with Kelly and American which may have been detrimental to United.

In order to meet these charges, it was important for these defendants, and also Kelly, to show the background facts in a light favorable to themselves. It follows that evidence of this character was entirely proper at the first trial. However, these defendants are not in the case now before us. Therefore, when it was proposed to read the original testimony into evidence at this DePinto trial, the trial court sustained objections made on the ground of immateriality.

We agree with these trial court rulings. Whatever DePinto might have discovered with reference to these background circumstances, he would still have been under a duty, as a director of United and under the circumstances of this case, to make a reasonable effort to ascertain the details of the plan as ultimately consummated. He made no such effort, and he cannot be excused on the ground that the facts pertaining to the preliminary negotiations would not have provided a warning that the ultimate plan would be prejudicial to United. It follows that, with respect to the particular dereliction charged against DePinto, a development of the background facts referred to above would not tend to relieve DePinto of liability. The proffered evidence was therefore properly rejected as immaterial.

On the same analysis we agree with the trial court that testimony of the same nature by Tompane and Gregory, offered for the first time at the DePinto trial, and certain "Admitted Facts" pertaining to these background circumstances, were also immaterial and properly excluded.

DePinto also contends that the trial court erred in

rejecting testimony with respect to the reputation, integrity and busines ability of various members of the Niesz group. DePinto argues that, for the purpose of appraising DePinto's conduct and his relationship to the transaction of October 18, 1957, the jury was entitled to know just what DePinto would have learned had he made an investigation of the Niesz group.

If DePinto had investigated the reputation of the individuals comprising the incoming group, and had reasonably believed therefrom that they were of good reputation, this would not have excused him, in view of all of the circumstances of this case, from making a reasonable investigation of the details of the October 18, 1957 transaction as ultimately transacted. Therefore, the trial court did not err in excluding this evidence.

DePinto asserts that the trial court erred in excluding certain proffered evidence pertaining to the value of the 30,800 shares of American stock which United received. We have examined the nature of the offered testimony and the purposes for which it was offered, and conclude that the trial court did not err in rejecting it.

DePinto argues that the trial court erred in instructing the jury, over his objections, that DePinto had been charged with certain acts or omissions. This instruction is quoted in note 1 above. DePinto asserts that this instruction invited the jury to find DePinto was negligent with respect to acts or omissions which had nothing to do with the transaction of October 18, 1957, and concerning which he was not charged under the pleadings.

DePinto overlooks the fact that the pretrial order superseded the pleadings. Plaintiffs' contentions, as set out in that pretrial order, were correctly summarized in the instruction quoted in note 1. Thus DePinto is not

correct in asserting that the acts or omissions listed in the instructions are not properly at issue. This intruction is correct even though some of those alleged acts may not have been a proximate cause of the loss sustained by United on October 18, 1957. The matter of proximate cause was dealt with in other instructions to the jury.

DePinto charges the district court with error in regard to several other instructions given over his objection. We have examined each such instance and conclude that the trial court did not err. We also conclude that the trial court did not err in refusing to give several instructions requested by DePinto.

DePinto contends that the trial court erred when, during the jury deliberations, the court answered a particular inquiry which the jury made in writing. The inquiry was for the court to repeat " . . . the 3 factors to be used in judging for the plaintiff." The court answered, in writing, that the three ultimate issues concerned DePinto's negligence in performing fiduciary duties, proximate cause, and damages. Amplifying the damage issue, the court listed the " . . . three items of claimed damage . . . " as shown in the margin.[7] DePinto argues that this itemization and totaling of the claimed damages volunteered information not requested by the jury, that it departed from the formal instructions, and that it practically invited the jury to render a judgment against DePinto for the total amount, without considering any reduction in that amount to the extent of the value of the shares of American stock received by United.

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[7] "The three items of claimed damage are:

1)	Cash, by check or bank certificates of deposit—	$166,498.66
2)	Promissory notes and accrued interest thereon—	87,626.88
3)	Mortgages, bonds and accrued interest thereon—	60,668.65
	Total	$314,794.19

Our examination of the record indicates that the described itemization of the claimed damages was substantially in accord with a formal instruction, to which no objection is urged on this appeal. It was also germane to the jury's inquiry concerning the ultimate issues, one of which was the issue of damages. Before giving this answer to the jury, the trial judge telephoned DePinto's counsel and the latter then indicated that it would be all right to mention the three ultimate issues, and also the items of claimed damages. No objection was made before the jury brought in its verdict.

Moreover, we do not believe the itemization of damages had the prejudicial effect DePinto ascribes to it. Without evidence to the contrary, it must be presumed that the jury followed the court's original instruction which directed the jury to reduce their final verdict to the extent of the value of American stock received by United.

The trial court did not err in giving the jury this written answer to their inquiry.

DePinto next argues that the judgment is excessive in three respects. One of these pertains to a provision of the merger agreement between United and Provident. The terms of that agreement provide that the net proceeds of any recovery in this stockholders' derivative action would be shared by each former owner of United stock in the proportion that the number of shares held by him bore to the total shares of United issued and outstanding. In accordance with this arrangement, "Certificates of Contingent Interest" were issued to the former stockholders of United.[8]

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[8] In the "Certificates of Contingent Interest" it is provided that there shall be deducted from any such net proceeds any

Pursuant to this plan, the 38,798 shares of United stock held by American were cancelled and all rights therein were relinquished and released. In addition, and in connection with the settlement which plaintiffs made with the executors of the Duhame estate, the latter released and surrendered the right to participate in any recovery herein to the extent of 3,750 shares of United stock.

The American shares and Duhame estate shares in United aggregated 42,548 shares, or roughly 42½% of the 100,000 shares of United outstanding at the time of the merger. DePinto asserts, therefore, that the former holders of United stock who will share in any net recovery herein, represent ownership of only 57½% of United stock originally issued and outstanding. He argues from this that the right of Provident to secure a judgment on behalf of the former United stockholders who will share therein should be limited to approximately 57½% of the total $314,794.19 claim arising from the October 18, 1957 transaction, or $180,856. Failure to reduce the judgment against DePinto to this amount, DePinto contends, would be grossly inequitable and would unjustly enrich the remaining 57½% of United's former shareholders.

In *Provident Security Life Insurance Company v. Gorsuch*, 9 Cir., 323 F.2d 839, 846-847, we held that the provision of the merger agreement releasing the net proceeds of this stockholders' derivative action to the former stockholders of United, did not render that agreement invalid. We also made it clear, however, that we were not passing upon the efficacy of that provision which

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recovery against Provident on possible claims which may be asserted against United which are not provided for in the merger agreement.

undertakes to transfer these net proceeds from Provident to the former shareholders of United. In this connection we noted that it might be legally impermissible to effectuate such a transfer because of its tendency to deplete Provident's assets, which should be retained for the benefit of Provident stockholders and policyholders, and others who might be adversely affected. We expressed the view that these matters must be left to future agreement or litigation in which affected persons, not represented in the present suit, may have an opportunity to participate.

It is clear from these observations in our prior decision, to which we still adhere, that it cannot now be ascertained whether there will be any net proceeds from this derivative action for former United shareholders and, if so, whether their respective shares would evidence unjust enrichment. There are additional considerations, suggested by Provident, which add other uncertainties as to whether former United shareholders would be unjustly enriched. We mention only two: a substantial part of the proceeds may be awarded as attorneys' fees and litigation expenses;[9] the dollar recovery which former United shareholders may realize under this provision of the merger agreement, may not measure their full loss, considering that they have lost their equity in a going life insurance company.

While DePinto has cited a number of decisions in support of his position on this branch of the case, we do

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[9] The judgment under review shows no such allowance, but in all likelihood provision will be made for attorneys' fees before any proceeds are transferred from Provident to others. In the previous judgment, entered on May 15, 1962, twenty-five percent of the full amount of the actual recovery, or $78,698.56, was allowed for legal services, together with necessary litigation expenses.

not find them persuasive under the special circumstances of this case. We hold that the trial court did not err in declining to reduce the judgment on the grounds discussed above.

A second respect in which the judgment is excessive, DePinto argues, results from the court's failure to credit the judgment against DePinto with the $100,000 Provident received in settlement of its claim against the Duhame estate. DePinto calls attention to Arizona decisions holding that a payment made by one joint tortfeasor must be credited upon the claim against another tortfeasor.

As pointed out earlier in this opinion, three claims were asserted against DePinto and several other defendants in the total amount of $553,353.63. The $100-000 received by Provident from the Duhame estate was allocated by the district court to the first of these claims, a claim of $177,863.84 for losses sustained by United between June 30, 1956 and October 18, 1957. This allocation was in accordance with the express terms of the settlement agreement, the indications being that there would not have been a settlement with Duhame estate if any substantial part of this $100,000 settlement had been allocated to the $314,794.19 claim for damages sustained by United on October 18, 1957, or the $60,695.60 claim for damages sustained by United between October 19, 1957 and June, 1959.

As a result of that settlement, the entire $177,863.84 claim passed out of the case. Thus DePinto was credited, in effect, in the amount of $177,863.84 against the aggregate of $553,353.63 in claims against him. Under these circumstances DePinto received more than was his due from the settlement with a joint tortfeasor, and no de-

parture from Arizona law occurred. DePinto's contention that the $177,863.84 claim was not in the case at the time of the Duhame estate settlement is without merit. It was set forth in the pretrial order which superseded the pleadings and was not dropped until after the settlement with the Duhame estate.

The trial court did not err in declining to credit the $100,000 Duhame estate settlement to the $314,794.19 verdict returned against DePinto.

DePinto argues that the trial court erred by including, in the judgment, interest at the rate of six per cent per annum from October 18, 1957 until payment. He argues that since the judgment is based on an unliquidated claim for negligence and breach of fiduciary duty, interest may be imposed only from entry of the judgment.

We agree. It is not here contended that DePinto benefited from the transaction of October 18, 1957, or that any Arizona statute authorizes the award of interest from the date of the tortious act. Under these circumstances, the Arizona rule permits interest on an unliquidater claim only from the date of judgment. See *Schwartz v. Schwerin*, 85 Ariz. 242, 336 P.2d 144, 149; *Cf. Feighner v. Clarke*, 2 Ariz.App. 286, 408 P.2d 219, 222. While *Schwartz* involved a claim for attorneys' fees on a quantum meruit basis, we think the Arizona court would apply the same rule with regard to a claim such as that prosecuted against DePinto.

The other contentions advanced by DePinto on this appeal have been examined, and we hold they are without merit.

Plantiffs have moved in this court for an order requiring the trial court to issue an order directing the

United States Marshal to proceed with the sale of real property subject to the judicial lien herein. The motion was made in this court on September 13, 1966, but has been held in abeyance pending determination of this appeal. It is a motion which, but for the pendency of this appeal, should have been addressed to the trial court. We deny the motion without prejudice to its renewal in the trial court upon the remand of this cause.

The cause is remanded with directions to modify the judgment to provide that interest at the rate of six per cent per annum shall run from entry of the judgment on June 28, 1965. The parties will bear their own costs on this appeal. In all other respects the judgment is affirmed.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

No. 20553

ANGUS J. DEPINTO, *Appellant*, and JAMES P. DONOHUE, as Trustee in Bankruptcy for the Estate of Angus J. DePinto, *Intervenor-Appellant*,

VS.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG, *Appellees*.

JUDGMENT

APPEAL from the United States District Court for the District of Arizona.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the this cause be and hereby is remanded to the said District Court with directions to modify the judgment to provide that interest at the rate of 6% per annum shall run from entry of the judgment on June 28, 1965; in all other respects the said judgment is affirmed, each party to bear his own costs on appeal.

Filed and entered February 24, 1967.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1406~~ 175

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG, *Petitioners,*

v.

ANGUS J. DE PINTO, and JAMES P. DONOHUE, as Trustee in Bankruptcy for the Estate of Angus J. DePinto, *Respondents.*

BRIEF OF RESPONDENTS ANGUS J. DE PINTO, AND JAMES P. DONOHUE, AS TRUSTEE IN BANKRUPTCY FOR THE ESTATE OF ANGUS J. DE PINTO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1406

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG, *Petitioners,*

v.

ANGUS J. DE PINTO, and JAMES P. DONOHUE, as Trustee in Bankruptcy for the Estate of Angus J. DePinto, *Respondents.*

BRIEF OF RESPONDENTS ANGUS J. DE PINTO, AND JAMES P. DONOHUE, AS TRUSTEE IN BANKRUPTCY FOR THE ESTATE OF ANGUS J. DE PINTO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COME Now the Respondents Angus J. DePinto, and James P. Donohue, as Trustee in Bankruptcy for the Estate of Angus J. DePinto, and present this Brief in Opposition to the Petition for Writ of Certiorari filed herein by Petitioners Provident Security Life Insurance Company, and Albert J. Doig.

STATEMENT OF THE CASE

On October 18, 1957, the officers and directors of United Security Life (later merged with Provident Security Life Insurance Company) caused to be transferred to American Security Investment Company assets having a face value of $314,794.19 in exchange for 30,800 class A common shares of American. American then transferred such assets to James E. Kelly in exchange for stock of United. At the time of the transaction, the resignation of Respondent Angus J. DePinto, as a member of the Board of Directors of United, had been accepted. He was not aware of the transaction and had nothing to do with it. He had no financial interest in United or American and did not benefit in any way from the transaction. (R.T. 197-199, 208-209, 494-495)

The Trial Court instructed the jury that DePinto could be held liable for damages sustained by United as a result of said transaction, by reason of his failure to attend directors' meetings, failure to examine minutes, failure to make inquiry as to important transactions of the corporation, and failure to act with respect to transactions potentially harmful to the corporation (R.T. 578). It was not claimed that DePinto was guilty of fraud or wrongdoing, or that he benefited in any way from said transaction.

With respect to damages, the Trial Court instructed the jury as follows:

> "In your computation of damages, the value, if any, you find of the American Security Investment Company stock received by United Security Life, as disclosed by the evidence, should be deducted from your findings as to the amount of

the value of the assets transferred to Kelly." (R.T. 587-588)

The jury rendered a verdict against DePinto in the amount of $314,794.19. In order to reach such verdict, the jury must have concluded that the assets transferred by United to American (and by it to Kelly) had a value of $314,794.19, and that the 30,800 shares of American stock, received by United in exchange, had no value. When the Trial Court entered judgment upon the verdict against DePinto, it included interest at the rate of 6% per annum from October 18, 1957, which, at the time of entry of judgment, amounted to approximately $140,000. The Court of Appeals ordered the judgment modified to provide that interest would run only from the date of the judgment.

ARGUMENT

1. "Conflict with Decisions of This Court

Petitioners do not contend that the claim against DePinto was liquidated and that interest should, therefore, run from the date of the transaction on October 18, 1957. Relying upon *Concordia Ins. Co.* v. *School District No. 98,* 51 S.Ct. 275, 282 U.S. 545, 75 L.Ed. 528 (1931), they argue that, in the absence of an "authoritative" state decision to the contrary, a Federal Court may, in order to arrive at a fair compensation, allow interest as an element of damage, even when the claim is unliquidated. The complete answer to Petitioners' argument is found in an "authoritative" decision of the Supreme Court of the State of Arizona to the contrary. In the case of *Schwartz* v. *Schwerin,* 85 Ariz. 242, 336 P.2d 144 (1959), the Supreme Court

of the State of Arizona considered a number of its prior and conflicting decisions involving the question of interest. It approved and applied the general rule that interest upon an unliquidated claim will run only from the date of judgment, and expressly overruled three of its prior decisions to the contrary. In passing, the Supreme Court of Arizona said:

> "This court in Arizona Eastern R. Co. v. Head, 26 Ariz. 259, 224 P. 1057, 1059, stated:
>
> > '* * * If the claim is unliquidated and is in dispute no interest is allowed upon the theory that the person liable does not know the sum he owes and therefore can be in no default for not paying.' (Citing cases.)
>
> and in the recent case of American Eagle Fire Ins. Co. v. Van Denburgh, 76 Ariz. 1, 257 P.2d 856, it was held that on an unliquidated claim interest should only be allowed from date of judgment. Cf. Borrow v. El Dorado Lodge, 75 Ariz. 218, 254 P.2d 1027."

The Court of Appeals recognized and applied the "Arizona rule". In the face of *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, 114 A.L.R. 1487, it had no alternative.

2. "Conflict" with Decision of the Fourth Circuit

The decision of the Court below is not in conflict with the decision of the Fourth Circuit Court of Appeals in *United States Fire Ins. Co.* v. *Wooten,* 71 F.2d 580 (4th Cir. 1934). That case did not involve the "Arizona rule".

3. Erie R. Co. v. Tompkins

Petitioners contend that *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, 114 A.L.R. 1487, should be overruled. In response, we deem it sufficient to point out that the reasoning of Justice Brandeis is as valid and persuasive today as it was when he wrote his opinion in 1938.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1422~~ 191

ANGUS J. DEPINTO, and JAMES P. DONOHUE, as Trustee in Bankruptcy of the Estate of Angus J. DePinto,
Petitioners,

v.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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OCTOBER TERM, 1966

No.

ANGUS J. DEPINTO, and JAMES P. DONOHUE, as Trustee in Bankruptcy of the Estate of Angus J. DePinto,
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v.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on February 24, 1967.

OPINION BELOW

The opinion of the Court of Appeals is reported at 374 F. 2d 37, and is found in Appendix A, *infra,* p. 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1967. The Court of Appeals denied the petition of appellants DePinto and Donohue for rehearing on March 29, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part V, Rule 19 of the Revised Rules of this Court.

QUESTION PRESENTED

Where a trial judge has been twice reversed in a case, and had made repeated rulings and observations adverse to a party, can there be any circumstances in which he can be disqualified from conducting a third trial?

STATUTE INVOLVED

The statutory provision involved herein is 28 U.S.C. § 144, reading:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure

to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. June 25, 1948, c. 646, 62 Stat. 898, as amended May 24, 1949, c. 139, § 65, 63 Stat. 99."

STATEMENT OF THE CASE

This case arises from a claimed breach of fiduciary duty by a director of a corporation. The matter was twice heard, twice resulted in judgment against the director, and was twice reversed by the Court of Appeals. On the third time around, the director moved to disqualify the trial judge. This motion was denied essentially on the ground that under the federal disqualification statute, there could be no such thing as bias developed in the case itself, and therefore the motion would not lie. The petition challenges any such rule, contending that the question of bias must at least be considered whether it arises in the case or not.

1. The underlying dispute is immaterial here except as it bears upon the rule of disqualification. The original action was brought against thirteen individuals and against three corporations. The thirteen individual defendants had, at some time or other, been members of the Board of Directors of one of the corporate defendants. Petitioner (DePinto) himself is a practicing physician. He became acquainted with the chief executive of the corporation in 1947 and in 1955, solely because of his friendship and at the request of the executive, became a member of the Board of Directors of one of these corporations. He received no compensation of any kind and in fact functioned nominally as a director. (T.R. 1, R.T. 197-199, 208-209, 494-495)

In the original trial of the action, some of the defendants waived a trial by jury. Others, including petitioner, did not. The jury in a special verdict exonerated petitioner, and one other defendant, of any wrongdoing. Other defendants were found guilty by the jury, and damages were assessed against them in the amount of $20,000 (O.T. 304). The trial judge set aside the jury verdict and entered judgment against petitioner and the other person found not guilty in the amount of $314,714.19. This entire first proceeding ended with a judgment in the $314,714.19 amount against seven defendants, judgments for $308,000.00 against five defendants, and a judgment in favor of one defendant (O.T. 354).

On appeal, this judgment was reversed by the Court of Appeals, 295 F. 2d 909, principally on the ground of the consequences of a certain merger which had occurred in the course of the corporate history of the enterprise.*

Upon remand, there were various amendments of the pleadings. Thereafter at a pretrial conference, the trial judge admonished attorneys for the defendants that they should not "go shopping" for another judge, and that he intended to stay with the case until its conclusion. Insofar as any knowledge on petitioner's part is concerned, this warning was wholly unprovoked (T.R. 64). Subsequently, when petitioner moved that judgment be entered in his favor upon the jury's original verdict and, in the alternative, demanded a trial

* When that objection had been raised by a defendant in the trial court, the trial judge asserted that his counsel was in contempt and that the presentation of what was eventually the ground of decision was a deliberate and malicious attempt "to pettifog" (O.T. 1214).

by jury of all the factual issues, the motion was summarily denied (O.T. 1623, 1628, 1630, 1708).

The trial court, instead of allowing the matter to be tried, merely readopted its original findings of fact and reaffirmed his earlier decisions (O.T. 1712, 1743). His second judgment, although practically identical with the previous judgment, did contain a new feature: it assessed interest, not from the date of judgment, but from a much earlier period, adding an additional penalty against the petitioner of approximately $90,000 (O.T. 1746).

Five defendants, including petitioner, again appealed. Once again, the Court of Appeals reversed and remanded, this time because of the trial judge's denial of a trial by jury.* This Court denied certiorari, 376 U.S. 950, 84 S. Ct. 966, 11 L. Ed. 2d 970 (1964). On a motion for rehearing, addressed to the Court of Appeals, petitioner requested the Court of Appeals to order the retrial of the action before a district judge other than the trial judge who had presided over the first two trials. The request was not granted.

On remand, the case was again assigned to the same judge. On September 24, 1964, after various proceedings preliminary to a third trial of the case, one of the attorneys for petitioner transmitted to the trial judge

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* *DePinto* v. *Provident Security Life Insurance Co.*, 323 F.2d 826 (9th Cir. 1963). Upon appeal from a judgment entered by the trial judge in a companion case, setting aside the merger of United with Provident, the trial judge was found guilty of numerous errors, including abuse of discretion. *Provident Security Life Insurance Co.* v. *Gorsuch*, 323 F.2d 839 (9th Cir. 1963), *cert. denied*, 376 U.S. 950, 84 S. Ct. 966, 11 L. Ed. 2d 970 (1964).

a letter requesting that he consent to the transfer of the case to another judge. In a reply letter, dated October 9, 1964, the trial judge refused the request (T.R. 64).

On November 20, 1964, pursuant to 28 U.S.C. Sec. 144, petitioner filed a detailed factual affidavit of bias and prejudice against the trial judge (T.R. 64). The general substance of this affidavit was that the court had become biased in the case in the course of the proceedings and that by virtue of this bias, the judge could not "consider the issues involved in this action with an open mind." In opposition, the opposing party contended that under the Federal Rule there could be no such objection, and that no question of disqualification could be raised after a second trial and second reversal. Respondent contended that the only possible bias was that which was "extra-judicial in origin," relying on such cases as *Craven* v. *United States*, 22 F. 2d 605 (1st Cir. 1927) and *Price* v. *Johnson*, 125 F. 2d 806 (9th Cir. 1942). He argued that "the conduct and rulings of the trial judge in the case itself" were never grounds of disqualification, citing *Chessman* v. *Teets*, 239 F. 2d 205, 215 (9th Cir. 1956).*

The district judge to whom the chief judge assigned the application found that these factors failed to show any indication of "personal" bias or prejudice and that, in any case, the matter could not be considered because the Court of Appeals had declined to assign another judge. This result was reaffirmed by the trial judge himself (T.R. 287).

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* Some point was also made that the matter could not be considered because the Ninth Circuit had previously refused to assign another judge, an order which was of course not appealable.

The matter then came on for trial.*

During the course of the jury's deliberations it made a specific inquiry of the trial judge in writing. The inquiry was for the court to repeat "* * * the 3 factors to be used in judging for the plaintiff." The trial judge answered in writing that the three ultimate issues concern petitioner's negligence in performing fiduciary duties, proximate cause and damages. In addition, however, he gratuitously amplified the damage issue with the following specific language:

"The three items of claimed damage are:

1) Cash, by check or bank certificates of deposit—	$166,498.66
2) Promissory notes and accrued interest thereon—	87,626.88
3) Mortgages, bonds and accrued interest thereon—	60,669.65
	$314,794.19"

(T.R. 238)

* In connection with settling the pretrial order, counsel for petitioner refused to agree to a certain matter. The trial judge said:

"In my mind, this is one of the most disgraceful incidents that I have seen in my entire period of practice, and especially in the period that I have been on the bench. It is a discredit to each one of you that any such things as this should arise and occur. In my opinion, you have misled me into believing that you were at the very last stage of agreeing upon a pretrial order that would be approved for entry. Not the slightest mention has been made otherwise until this moment, and in my opinion, this is unworthy of reputable counsel, and I find it difficult to be restrained in my comments about it.

"I thought I was trying to be as courteous and decent and friendly and considerate to you people as I possibly could be, and you have treated me with disrespect and discourtesy, and I resent it tremendously." (R.T. 126-27).

At the conclusion of the third trial of this case, the jury returned a verdict against petitioner in the amount of $314,794.19, and the trial judge entered a judgment for that amount, again with interest running from a pre-judgment date, rather than from the date of judgment (T.R. 235, 262). After a denial of petitioner's motion for judgment notwithstanding the verdict and, in the alternative, for a new trial, petitioner prosecuted his third appeal to the Court of Appeals. Thereafter petitioner was adjudged a bankrupt and his Trustee, James P. Donohue, was allowed to intervene as an appellant.

On February 24, 1967, the Court of Appeals handed down its opinion affirming the judgment below except as to the running of interest from October 18, 1957. Petitioner's application for a rehearing was denied on March 29, 1967.

2. The matter was appealed to the Court of Appeals principally on the merits, but it was also expressly appealed on the grounds of the disqualification. Respondent in his brief before the Court of Appeals on the disqualification point again argued, this time even more directly and with fuller citations, that bias and prejudice to disqualify must be personal in the sense that it can never arise from the case itself. "Impersonal prejudice" it was contended could never be a ground of disqualification. See brief of appellee, pp. 126-28. The Court of Appeals thought so little of petitioners' argument to the contrary that it did not even discuss the point.

REASONS FOR GRANTING THE WRIT

1. The courts below have operated on the assumption that in the federal practice there can be no bias developing from a pattern of rulings and from repeated reversals. We contend that in appropriate circumstances, such a pattern and such experience can constitute a sufficient basis for the disqualification of a trial judge under 28 U.S.C. Sec. 144. We do not ask this Court to immerse itself in the facts to determine whether or not the trial judge should have been disqualified. We do contend that it is important to the administration of justice whether in any circumstances a judge may thus be disqualified, and we ask that the case be reversed and remanded to the Court of Appeals to consider the question under applicable standards.

In this case the same judge presided through two trials, two reversals on appeal, a third trial, a third appeal and a third reversal in part. Petitioners are not asking the Court to consider this case with the idea of establishing an automatic rule for trial judges of "two strikes and you're out." Petitioners are asking the Court to consider this case with the idea of establishing clearly that a series of *reversed* adverse rulings can, under appropriate circumstances support a claim of personal bias and prejudice calling for disqualification. The number of times that a trial judge may have been reversed in a particular case is not necessarily of controlling importance. But reversed adverse rulings can, in some cases, be the basis for a genuine belief that a particular trial judge cannot fairly and impartially preside over subsequent proceedings in the same action and, therefore, should be the basis for an effective affidavit of bias and prejudice.

It is perfectly well established that mere reversal does not by itself warrant disqualification; *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 236, 67 S. Ct. 756, 91 L. Ed. 854 (1946). In that case the Court reversed a ruling of the Court of Appeals for the Eighth Circuit to the effect that the NLRB had improperly denied an employer's application for a new trial examiner to preside over a second hearing of certain unfair labor practice charges. In this regard, Justice Frankfurter, speaking for the Court, said:

> "The Court seemed to be moved by the generous feeling that a party ought not to be put to trial before an examiner who, by reason of his prior rulings and findings, may not be capable of exercising impartiality. Certainly it is not the rule of judicial administration, that, *statutory requirements apart, see Judicial Code § 21, 28 USCA § 25, 7 FCA title 28, § 25,* [the statute involved in this petition] a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings." [Emphasis supplied.]

By reference to the very statute involved here, the Court clearly implied that when something else is added by way of bias to a record of reversals, the judge may be disqualified.

The precise question of whether, in any circumstances, previous experience in a case may be disqualifying has never been decided by this Court. The three leading cases leave the matter open:

(a) *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 33 S. Ct. 1007, 57 L. Ed. 1379 (1913). In that case, after a district judge had made several inter-

locutory rulings in a bankruptcy proceeding, an affidavit of bias and prejudice was filed against him. The judge thereupon refused to proceed further in the matter, and the circuit judge assigned another judge. A writ of mandamus was sought to compel the reassignment of the original district judge. This Court held that mandamus would not lie in such a situation since the order reassigning the case would be reviewable on appeal. This is all this Court actually held in that case.

Although the Court refused to decide the question of either the timeliness or the sufficiency of the affidavit involved, Justice Lurton *en passant,* recorded some rather extensive views on the subject of affidavits of bias and prejudice. Among them there appeared the following statement which is often quoted (230 U.S. at 44):

> "It [the affidavit] was never intended to oust a judge because of adverse rulings made . . . ."

In context, it is apparent that the "adverse rulings" that Justice Lurton was talking about were those which were "reviewable otherwise." His complete statement follows:

> "It [the affidavit] was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, *for such rulings are reviewable otherwise,* but [was intended] *to prevent his future action in the pending cause.* Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard." [Emphasis supplied.]

Certainly this complete statement is a far cry from the situation presented in the instant case where, at the time the affidavit was filed, the adverse rulings had already been reviewed and reversed, the intent of the affidavit was "to prevent his [the judge's] future action in the pending cause", and the affidavit was not intended "to disqualify him [the judge] between a hearing and a determination of the matter heard."

(b) *Berger* v. *United States,* 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921). In that case, the affidavit of bias and prejudice was filed prior to the initial trial and was predicated on views and opinions expressed by the trial judge prior to the commencement of the action. The judge rejected the affidavit and proceeded to try the case. The question certified by the Circuit Court of Appeals for the Seventh Circuit to this Court for decision was, in the words of this Court,

> "whether the filing of an affidavit of personal bias or prejudice compels his [the judge's] retirement from the case, or whether he can exercise a judgment upon the facts affirmed, and determine his qualification against them and the belief based upon them."

The Court held the latter to be the correct view and that because the affidavit was sufficient to disqualify the trial judge he had erred in rejecting it and proceeding with the case.

In *Berger,* Justice McKenna, for the Court, made the following reference to the *American Steel Barrel* case:

> "The case establishes that the bias or prejudice which can be urged against a judge must be based

> upon something other than rulings in the case." 255 U.S. at 31.

In a later portion of his opinion, Justice McKenna states quite succinctly what petitioners believe to be the only relevant proposition, albeit dictum, that can be derived from *American Steel Barrel,* namely:

> ". . . Ex parte American Steel Barrel Co., supra, decides that it [the affidavit] must be based upon facts antedating the trial, not those occurring during the trial." 255 U.S. at 34.

Such are the facts upon which the affidavit in the instant case was based, i.e., "the facts antedating" the third trial.

(c) Most recent is *United States* v. *Grinnell Corporation,* 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966). In this case an affidavit of bias and prejudice was filed prior to an initial trial predicated upon remarks and rulings made by the trial judge in the course of preliminary proceedings. This Court said:

> "The alleged bias and prejudice to be disqualifying must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." 384 U.S. at 583.

In context, the discussion in *Grinnell* shows that this Court did precisely what we contend should be done: It examined the record closely and carefully to determine whether the court's rulings taken as a whole reflected bias and prejudice. It carefully looked to determine whether the conduct of the judge manifested "a closed mind on the merits of the case"

[just what was alleged here], and held that it did not. This is exactly the kind of inquiry which should have been made in the instant case but never was. 384 U.S. at 583.

3. Any question involving the impartiality of the administration of justice is vitally important, for the basic strength of our entire judicial system lies in the confidence of the people in the fairness and impartiality of those who administer it.

The concern of Congress was forcefully stated by this Court in *Berger* v. *United States, supra,* as follows:

> ". . . we may say that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial,—free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment." 255 U.S. at 35-36.

This Court has highlighted the importance of all such questions, especially with respect to the conduct of trials, in the following statement:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison,* 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955).

More recently, in *Raff* v. *Van Dusen,* 350 F. 2d 806, 812 (3d Cir. 1965), the court had this to say:

> ". . . For the proper administration of justice requires of a judge not only actual impartiality,

but also the appearance of a detached impartiality. Litigants are entitled, moreover, to a judge whose unconscious responses in the litigation may be struck only in the observing presence of all parties and their counsel."

We come then to the final hurdle of whether the question presented in this case, "unsettled" and "important" though it be, is one which should be settled by this Court. Clearly, if the principle involved could *only* come into play in circumstances as unusual as those presented in the present case where there have been two trials and two reversals, to say nothing of all the other factors involved, this Court should not burden itself with settling it, regardless of the unconscionable fate to which *this* petitioner would be left. But that is not the situation. Once again it should be noted that petitioners are not seeking to establish a rule of automatic disqualification because of a certain number of reversed adverse rulings. What petitioners are seeking is to have the Court affirm the principle that reversed adverse rulings can, under appropriate circumstances, constitute the basis for an effective affidavit of bias and prejudice. Such a principle can come into play in any legal action and in circumstances that are both usual and frequent. Whenever a case is remanded by an appellate court either for an initial trial or a retrial and the case begins moving again towards the trial stage, the principle *could* apply, given the appropriate circumstances. Petitioners are not asking this Court to remove those legal obstacles to capricious or spiteful disqualification efforts without which the judicial process would come to a halt. There has developed a widely accepted dogma that adverse rulings of a trial judge cannot

under any circumstances constitute the basis for an effective affidavit of bias and prejudice under 28 U.S.C. § 144. See, for example, *Craven* v. *United States,* 22 F.2d 605 (1st Cir. 1927); *Morse* v. *Lewis,* 54 F.2d 1027 (4th Cir. 1932); *Sacramento Suburban Fruit Land Co.* v. *Tatham,* 40 F.2d 894 (9th Cir. 1930); *Minnesota & Ontario Paper Co.* v. *Molyneaux,* 70 F.2d 545 (8th Cir. 1934); *Wilkes* v. *United States,* 80 F.2d 285 (9th Cir. 1935); *Littleton* v. *DeLashmutt,* 188 F.2d 973 (4th Cir. 1951). *Cf.* for example, *Nations* v. *United States,* 14 F.2d 507 (8th Cir. 1926); *Morris* v. *United States,* 26 F.2d 444 (8th Cir. 1928). It is significant, petitioner believes, that in none of these decisions were *reversed* adverse rulings involved. It is also significant that in almost every one of them *American Steel Barrel* and *Berger* were erroneously cited.

It is obvious from a review of scores of decisions that at the foundation of this dogma (that adverse rulings cannot under any circumstances constitute the basis for an effective affidavit) lies the notion that, as a matter of law, a trial judge is *incapable,* during the course of a lawsuit and as a result of his exposure to the parties and their attorneys and to the legal issues involved, of acquiring a disqualifying "personal bias and prejudice."

4. Interpretation of the federal disqualification statutes has traditionally been grossly hostile to the fair scope of those statutes. The good old clubbable feeling that of course anyone appointed as a federal district judge is above bias has resulted in restrictive interpretations of fair laws intended to protect the public; Frank, *Disqualification of Judges,* 56 Yale L. J. 605,

628, *et seq.* (1947); and see Schwartz, *Disqualification for Bias in the Federal District Courts,* 11 U. Pitt. L. Rev. 415 (1950). The law has polarized around principles of "hard" and principles of "easy" disqualification, and the federal system has been on the "hard" side; see Frank, *id.* at 609.

Whatever justification there may have been for this attitude and this policy in an era of small population and few district judges, it disappears when there is such a sufficiency of district judges that there is no difficulty at all in avoiding any appearance of bias by putting a fresh mind to work. To say that bias can arise only from some previous personal association in urban centers in which millions of people live, almost none of whom could conceivably have ever had any previous contact with the judge at all, means as a practical matter that there is no disqualification for bias. Of course, as a realistic matter, bias is essentially a product of experience and intellectual conviction; when the Nazis annihilated the Jews, no one suggests that any particular Nazi necessarily had any particular prejudice against any particular Jew. The whole theory of the "banality of evil" is that the biased and prejudiced person may simply be doing what in his own mind is a workaday job. To deny that overwhelming biases and prejudices can arise simply from the experience of trial is to deny that strong men can have strong—sometimes excessively strong—intellectual convictions. This is precisely the sort of circumstance which the Court should be alert to avoid. For, to give an illustration of just one kind of in-trial bias, see the observation of Justice Black in *Sacher* v. *United States,* 343 U.S. 1, 14, 17, 72 S. Ct. 451, 96 L. Ed. 717 (1950), "No man should be forced to trial

before a judge who has previously publicly attacked his personal honor and integrity. The risk to impartial justice is too great." Some of the comments in the instant case are close to this category.

5. The underlying principles of the decision below cannot be squared with the decisions in *Knapp* v. *Kinsey,* 232 F.2d 458 (6th Cir. 1956); *United States* v. *Ritter,* 273 F.2d 30 (10th Cir. 1959) and *United States* v. *Drum,* 329 F.2d 109 (1st Cir. 1964) in which the developments of bias and prejudice by the trial judges during the course of the proceedings were held to justify reversal on appeal.

6. We are dealing fundamentally with a matter of practice and procedure, precisely the kind of question most within the discretion of this Court, and it should not be necessary to obtain an Act of Congress bringing the federal practice as to disqualification up to date. There is a better state practice which ought to be followed in the federal system. In the cases of reversed judges, some states have adopted precisely the practice we advocate here, that circumstances should be considered to determine whether the previous judicial experience has created a bias. See *Keating* v. *The Superior Court,* 45 Cal. 2d 440, 289 P.2d 209 (1955), holding that where a judge is about to retry a case and has previously expressed the view, however temperately, that a party has sworn falsely, he shall be disqualified:

> "When a judge has stated that a party has given false testimony, even though his belief is founded on the evidence before him, he is disqualified from retrying the case." 289 P.2d at 211.

See also *In re Hupp's Estate,* 178 Kans. 672, 291 P.2d 428 (1955), also a retrial case in which the judge was disqualified:

> "... the composite or collective impression gained by careful consideration of the overall situation, as it existed at the time of the overruling of the petition for disqualification, forces this court to the conclusion that it would be better for all parties concerned, and of a certainty conducive to the best interests of the judiciary in general, if the trial judge had sustained the petition for disqualification and permitted the case to be tried by a judge pro tem."

The Kansas court expressly recognized the rule that previous adverse rulings do not ordinarily show bias, but held that "the existing circumstances and conditions" cast doubts on the impartiality of the trial judge. And see *State* v. *Scarborough,* 75 N.M. 702, 410 P.2d 732 (1966), holding that a person who had previously been adjudged in contempt by a trial judge should not be required thereafter to be tried before him.

These cases suggest what is to us the sound rule: After repeated reversals, the question of bias, upon application duly made, should be considered to determine whether upon the record taken as a whole, it appears that the reversed judge has developed such a "closed mind on the merits of the case," *United States* v. *Grinnell Corporation, supra,* that it is no longer possible to have a fair trial before him.

Judges often sit on the same case after remand. Petitioners are fully aware that to establish a rule which would permit automatic disqualification in such situations could have a seriously disruptive effect on the administration of justice. Petitioners also recog-

nize that in the case of a reversal and remand where the issues are complex that there may be great advantages in having the same judge preside over the second trial because of his familiarity with the intricacies of the case. These are considerations of the mechanics of effective judicial administration. But there are also the humanities of effective judicial administration to be considered. As previously pointed out, the strength of our judicial system lies in the people's confidence in the impartiality and fairness of those who administer it. Therefore, what people, including individual litigants, think in terms of human relations as regards the performance of our courts is vitally important. *In re Murchison, supra; Raff* v. *Van Dusen, supra.*

Accordingly, when the existence of a personal bias and prejudice on the part of a judge is asserted, it becomes the solemn duty of our courts to weigh the humanities of justice with the mechanics of justice. The interest of the litigant in being assured an impartial trial by an impartial judge must be weighed against the interests of the other litigants, the courts themselves, and society as a whole in having cases adjudicated with the greatest possible dispatch. This weighing process is a difficult one at best.

Petitioners respectfully submit that the federal courts cannot properly fulfill their obligation to weigh the conflicting interests involved in the consideration of affidavits of bias and prejudice under 28 U.S.C. Sec. 144, unless and until this Court settles what the weights are to be put on the scales. With respect to reversed adverse rulings, the evaluation of conflicting interests and of the fixed circumstances should be un-

dertaken by the courts as in all other cases involving charges of bias and prejudice; the issue of trial-bred prejudice should not be evaded by dogmatic and erroneous statements that 28 U.S.C. Sec. 144 bars even its consideration. The question presented by the instant case is not only important and unsettled, but deserves to be settled in the interests of the fair operation of the judicial system.

CONCLUSION

It is respectfully submitted that the writ of certiorari should issue to review the decision of the court below.

Respectfully submitted,

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May, 1967.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,553

ANGUS J. DEPINTO, *Appellant*,

and

JAMES P. DONOHUE, as Trustee in Bankruptcy for the Estate of Angus J. DePinto, *Intervenor-Appellant*,

v.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG, *Appellees*.

[February 24, 1967]

Appeal from the United States District Court for the District of Arizona

Before: BARNES, HAMLEY and JERTBERG, *Circuit Judges*

HAMLEY, Circuit Judge:

This stockholder's derivative action, based on diversity of citizenship, was originally brought on behalf of United Security Life (United), an Arizona stock insurance corporation, by John S. Gorsuch, a citizen of Ohio. The defendants were Augus J. DePinto, Edwin B. Pegram, Francis I. Sabo, Hjalmar B. Landoe, Elmer W. Duhame, together with eight other personal defendants and three companies in addition to United. With regard to DePinto and certain other defendants, damages in the sum of $447,633.70 were sought, including an item for $314,794.19, based on a transaction which occurred on October 18, 1957, to be described below.

After commencement of the action, but prior to trial, United merged with Provident Security Life Insurance

Company (Provident). However, neither Provident nor a stockholder of that company was made a party to the action. The case was tried to a jury which returned a general verdict for plaintiffs in the sum of $20,000 against Pegram, Sabo, Landoe and Vernon E. Niesz. The jury also returned special verdicts in which it exonerated DePinto and Duhame of liability. As to them the jury found, among other things, that they had not breached any then existing fiduciary duty to United nor, as directors of United, acted in a negligent manner, proximately causing loss to United with respect to the transfer of the assets in question.

The trial court considered the verdicts to be advisory only. The court determined that the verdicts were not supported by the evidence, issued its own findings of fact and conclusions of law, and entered a joint and several judgment in favor of United against twelve of the personal defendants, in amounts ranging from $308,000 to $314,794.19. The award against DePinto was for $314,794.19. In the alternative, and on the assumption that the defendants were entitled to a jury trial, the trial court granted plaintiff's motions for directed verdicts in the same amounts as it had allowed on the basis of its own findings of fact.

DePinto, Pegram, Sabo, Landoe and Duhame, effectuated appeals to this court. We reversed and remanded for further proceedings on the ground that, by reason of the merger of United into Provident, Gorsuch, as a stockholder in United, lost his capacity to maintain this derivative action, and United lost its capacity to be sued and its capacity, as the real party in interest, to obain a judgment. *Niesz* v. *Gorsuch*, 9 Cir., 295 F.2d 909 (1961).

Upon remand, Provident was joined as a plaintiff and was realigned by the trial court as a defendant. The trial court allowed Albert J. Doig, a former stockholder of United and a then-existing stockholder of Provident, to intervene as a party plaintiff. Provident and Doig filed

complaints in intervention in which, on behalf of Provident, they sought damages against DePinto, Pegram, Sabo, Landoe and Duhame and several others, in the amount of $314,794.19. The allegations in support of these claims were generally similar to those of the amended complaint and pretrial order in the original Gorsuch suit. The five named defendants filed answers joining issue on the allegations of the complaint and raising certain affirmative defenses, which plaintiffs contested. No further testimony was taken on the merits of the controversy.

The trial court re-adopted its original findings of fact and reaffirmed its original decision. The court specifically held that DePinto, Landoe, Sabo, Pegram and Duhame had been guilty of gross negligence and that all of them, except Landoe, had breached fiduciary duties in connection with the diversion of United's funds. Supplemental findings and conclusions of law were entered, together with a judgment in favor of Provident and against the same twelve personal defendants, in the same amounts as in the case of the original judgment. Alternatively, as in the case of the original judgment, this second judgment also rested on directed verdicts which were entered in favor of plaintiff.

DePinto, Landoe, Sabo, Pegram and Duhame appealed. We again reversed and remanded for a new trial, holding that the defendants were entitled to a jury trial, and that, considering the alternative basis for the judgment, the Seventh Amendment forbids an award of damages in excess of a jury verdict, not consented to by the defendants. *DePinto* v. *Provident Security Life Insurance Company*, 9 Cir., 323 F.2d 826 (1963).

Following the second remand, there were three important developments before the case proceeded to another jury trial. One of these was the entry of a comprehensive pretrial order which superseded the pleadings. Among other things, this order contains a lengthy statement of admitted facts, a detailed list of the contentions of the respective

parties,[1] and a restatement of plaintiffs' claims against the various parties. With regard to DePinto and several other named defendants, a total claim of $553,353.63 was asserted, itemized as follows:

(1) $177,863.84 for damages sustained by United between June 30, 1956 and October 18, 1957;

(2) $314,794.19 for damages sustained by United on October 18, 1957, by reason of a transfer of assets as described below; and

(3) $60,695.60 for damages sustained by United between October 19, 1957 and June, 1959.

A second pretrial development was the agreement by executors of the estate of Duhame, deceased, to pay Provident the sum of $100,000 in consideration for a covenant not to sue. The trial court ordered that this sum be allocated

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[1] In its instructions to the jury, the trial court summarized plaintiffs' contentions, as follows:

"The particular acts or omissions on the part of the defendant DePinto, which plaintiffs allege occurred and amounted to negligence or breach of fiduciary duty are as follows: Acceptance of the office of director without intending to discharge the duties and responsibilities of director; delegating or relinquishing his responsibilities as a director to Kelly; failing to attend directors' meetings; failure to examine minutes, records and transactions and documents of the corporation; failure to keep himself advised by reasonable inquiry as to important transactions of the corporation, and particularly as to the transactions in question resulting in the transfer to Kelly of corporate assets; failure to investigate and to require measures for protection of the corporation with respect to conditions and transactions potentially harmful to the corporation and stockholders when such were brought to his attention or of which he should have learned in the exercise of reasonable care, and failure to exercise reasonable care to assure that adequate funds, property, and security be obtained by the corporation in return for the transfer to James E. Kelly of substantial assets of United Security Life."

to the $177,863.84 claim referred to above, and withdrew this claim from the case. The estate of Duhame was thereby dropped as a defendant. The third pretrial development was the action of the trial court, at the request of plaintiff Doig, and over the objection of DePinto, in severing the cause as to the remaining defendants, and ordering that the case proceed to trial against DePinto as the sole defendant.

It would appear, from an examination of the record, that the $60,695.60 claim against DePinto was also dropped before the case reached the jury. This is also indicated by the fact that, in its instructions to the jury, the trial court made reference only to the $314,794.19 claim. The jury returned a verdict in favor of Provident and against DePinto in that sum and on June 28, 1965, judgment was entered on the verdict. DePinto then took the present appeal.[2]

Subsequent to the institution of this appeal, DePinto was adjudicated bankrupt and James P. Donohue was appointed as Trustee in Bankruptcy. An order was subsequently entered in this court permitting the Trustee to intervene in this appeal. DePinto and the Trustee have identical interests on this appeal, and have filed joint briefs. In referring, below, to DePinto's contentions and arguments, we have also included the Trustee's identical contentions and arguments.

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[2] In addition to the instant appeal and the two other appeals referred to above, the subject matter of this litigation has spawned several other lawsuits, some of a collateral nature, which have reached this court since the Gorsuch suit was filed on November 4, 1958. See *Mauser* v. *United Security Life*, 9 Cir., 267 F.2d 3 (1959); *Mauser* v. *United Security Life*, No. 16261, now pending on second appeal; *Provident Security Life Insurance Company* v. *Gorsuch*, 9 Cir., 323 F.2d 839 (1963); *In re Doig*, No. 20460, order of November 2, 1965, unreported; *Gorsuch* v. *Fireman's Fund Insurance Company*, 9 Cir. 360 F.2d 23 (1966). Additionally, *DePinto* v. *Provident Security Life Insurance Company*, No. 20308, and *DePinto* v. *Provident Security Life Insurance Company*, No. 20656, consolidated for disposition in this court, are being decided in another opinion filed today.

The damages awarded by the trial court were intended to reimburse Provident for the loss sustained by its predecessor, United, in connection with a transfer of assets from United to American Security Investment Company (American), in exchange for 30,800 shares of American's assertedly worthless shares. DePinto was a director of United until immediately prior to the transfer in question.

He contends on this appeal that the undisputed evidence discloses that any loss which may have been sustained by United as the result of its exchange of assets for stock in American was not proximately causd or contributed to by any act or omission of DePinto as a director of United. Accordingly, he argues that the trial court erred in denying his motion for a directed verdict, made at the close of all of the evidence, and his motion for judgment notwithstanding the verdict.

We now state the salient facts as the jury could have found them on the basis of the evidence received at the trial.

In 1947, DePinto, a practicing physician with substantial investment interests, met James E. Kelly, one of the defendants in the original Gorsuch action. The two became friends and business associates. DePinto worked with and assisted Kelly in promoting Life Underwriters, Inc. (Underwriters), which was formed on June 16, 1952. Kelly was the president and DePinto a director of that company.

On November 21, 1952, Kelly organized United and held office as a director and officer of United from its inception until July, 1956. Although DePinto was not involved in organizing United, he soon learned that Underwriters had become the exclusive operating management and sales agent for United.

Before DePinto became officially connected with United, he attended a March 29, 1955 meeting of its directors, where he heard complaints about Kelly's management of

United. On October 14, 1955, DePinto, responding to a request by Kelly, became a director of United.

He was not, however, an active director. At no time during his term as a director of United did he make a telephone call to United's office to obtain information concerning that company's financial condition. DePinto was not aware that United sustained losses in 1955, 1956, and up to October 18, 1957. He did not know who were the officers of United from July 18, 1956 to October 18, 1957.

Although Kelly resigned as president and director of United on July 18, 1956, DePinto did not become aware of this until October 18, 1957. On several occasions he signed the minutes of the directors' meetings without reading them. On two occasions when he was not in attendance, he signed minutes which recited that he was present in person.

In the fall of 1957, Kelly decided to sell his controlling stock interest in United. About October 13 or 14, 1957, he suggested to DePinto that in view of the imminent sale of Kelly's stock, DePinto should resign as a director. During this conversation Kelly told DePinto that the purchasers of Kelly's stock in United would gain control of United, but the names of the purchasers were not then disclosed. DePinto did not inquire as to the details of the plan or how it would affect United.

Late on the afternoon of October 17, 1957, American was organized, with Sabo, Pegram, Landoe, Roslyn B. Croydon, John D. Ballantyne and Niesz as the incorporators and directors. On October 18, 1957, Kelly agreed in writing to sell 35,149.89 shares of United stock to American for $325,136.48. At 3:30 p.m. that afternoon, a meeting of the board of directors of American was held. The minutes of that meeting recite that Croydon reported that negotiations had been completed for the acquisition of approximately forty percent of the shares of United, "representing working control," to be paid for partly in cash and partly in

assets which could be acquired from United in payment of Class A shares of American.

The directors of American thereupon adopted the four resolutions noted in the margin.[3] As indicated by these resolutions, American had arranged to sell to United 35,000 Class A common shares of American stock. The resolutions by American also indicate that in part payment for the 35,149.89 shares of United which Kelly was selling to American, Kelly was to receive the assets of United which American had acquired in payment for American stock.

A meeting of the board of directors of United was held at 4:00 p.m. on October 18, 1957. At that meeting, with directors DePinto, N. J. Dunn and J. L. Jenkins in attendance, a resolution was adopted accepting the resignations of A. Thomas Duncan, Patrick J. Kelly, E. Hartley Brown, T. J. Flaherty and Spence Reese, as directors of United. This resolution further provided that Niesz, Ballantyne, Croydon, Sabo, Pegram and Harvey T. Goss be elected as directors of United.

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[3] These resolutions were summarized in appellant's opening brief as follows:

> "(a) That American sell to United 30,800 class A common shares of American for a consideration of $308,000, consisting of the assets referred to and described as items 1 through 6 in the United minutes of October 18, 1957, and hereinabove quoted from Exhibit 5H;
>
> "(b) That American sell to United 4,200 shares of its class A common stock for the sum of $42,000, to be paid in cash on or before February 1, 1958;
>
> "(c) That American accept the offer of James E. Kelly to sell 35,149.89 shares of United stock to American for $9.25 a share, and that American pay Kelly therefor by transferring to him the above-mentioned assets of United, plus additional cash in the amount of $17,136.48;
>
> "(d) That American accept the offer of United Family Guild to sell 3,650 common shares of United to American at $9.25 a share, payable in cash."

A second meeting of United's directors was held at 4:15 p.m. on that day, with only four of the directors (Niesz, Ballentyne, Croydon and Goss) in attendance. Three of these (Niesz, Ballantyne and Croydon) were directors of American and had participated in American's board meeting held at 3:30 p.m. earlier that afternoon.

The minutes of the 4:15 p.m. meeting of United first recite that Dunn, Jenkins and DePinto had previously tendered their resignations as directors, and record the adoption of a motion accepting these resignations. According to the minutes, two resolutions were then adopted, the effect of which was to subscribe for 35,000 shares of Class A common shares of American at ten dollars per share. All but 4,200 of these shares were to be purchased immediately for a total consideration of $308,000, consisting of United's secured and unsecured promissory notes, bonds, certificates of deposit and cash.

On the day these transactions took place, American did not have a permit from the Securities Division of the Arizona Corporation Commission authorizing the issuance of shares of its nonvoting common stock to United. At this time both Kelly and Croydon knew that Kelly was to be paid with $308,000 in assets of United for his sale to American of his stock in United. United was in a deficit condition on October 17, 1957. The 30,800 shares of American which were sold to United on October 18, 1957, apparently had no fair market value, which resulted in increasing United's existing deficit by $308,000.

In arguing that the undisputed evidence discloses that any loss which may have been sustained by United was not proximately caused or contributed to by any act or omission of DePinto as a director of United, DePinto does not refer to the numerous charges set out against him in the pretrial order, or as summarized in the instructions to the jury. Instead, he refers to two counts of the Doig complaint. Count VI of that complaint charges that DePinto

"caused" United to transfer $314,794.19 to American, and that he and others breached their fiduciary duties by "permitting" United to enter into the agreement with American. Count VII of that complaint charges that DePinto and others "negligently" transferred control of United to the Niesz group which "looted" United.

Based on this formulation of the charges against him, DePinto first asserts that his resignation as a director of United was accepted by United's board of directors before the new board adopted the resolution authorizing the transfer of United's assets to American. DePinto argues that since he was not a director of United when this resolution was passed, he had no opportunity or authority to oppose the adoption of that resolution and therefore could not have "caused" or "permitted" the transfer of United's assets to American as charged in Count VI.

DePinto also argues that, contrary to the Count VII charge, there is no evidence to indicate that he negligently participated in a transfer of control of United to the Niesz group, nor that this negligence was a proximate cause of United's loss. Such negligence could be shown, he asserts, only if there is evidence to indicate that, had he made an investigation, he would have discovered that a member of the Niesz group was otherwise than a reputable and respected business or professional man. DePinto contends there is so such evidence. Thus, as to the Count VII charges, DePinto does not reach the question of proximate cause.

The jury verdict represents a finding that a proximate cause of United's loss on October 18, 1957, was DePinto's negligence in failing to keep himself informed concerning United's affairs, in failing to determine whether the new group would obtain control of United in a manner which would prejudice that company, and in failing to take effective action to thwart the plan which, upon a reasonable investigation, would have been shown to be contrary to the

best interests of United. The verdict does not represent a finding that a proximate cause of United's loss was negligence on his part in failing to investigate the reputation of the proposed new directors before DePinto tendered his own resignation as a director. No such contention was advanced by plaintiffs,[4] and no evidence was produced by plaintiffs tending to prove such a contention.

According to the evidence, DePinto was aware of complaints against Kelly's management of Underwriters, an associated company. He knew that he was uninformed about the financial affairs of United. He was aware of the seeming haste with which the plan to transfer control of United from Kelly to the Niesz group was executed. He was chargeable with knowing that United was then in a deficit condition. He knew that Kelly and others had not told him the details of the proposed transaction.

The jury could have found, on the basis of these and other circumstances that, in the exercise of reasonable care and in the fulfillment of his fiduciary duties as a director of United, DePinto should have made a reasonable effort to ascertain whether the proposed shift in control would be inimical to the best interests of United. The jury could have further found that a reasonable investigation by DePinto would have revealed that United stood to lose. All that was needed to expose the fraudulent scheme was for DePinto to ascertain that part of the transaction was for United to acquire 30,800 shares of American for a price of $314,794.19 in United assets, and to discover how much the 30,800 shares of American were worth. He would at least have learned that these shares of American, in existence just one day, were of doubtful value.

The jury could also have found that, armed with such information, it would have been DePinto's duty to decline Kelly's request that he resign as a director. Continuing

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[4] See note 1.

as a director, the jury could have found, would have enabled DePinto to actively to oppose the proposal before the board and, if necessary, draw the matter to the attention of stockholders and policy holders of United, and to the attention of state regulatory officials. The jury could have found that DePinto's failure to make a reasonable investigation as to whether the ultimate plan would adversely affect United, his resignation from the board of directors in compliance with Kelly's request and without having made such an investigation, and his failure, as a member of the board of United, to fight for the best interests of United, considered together, constituted negligence and a breach of fiduciary duty and was a proximate cause of the loss sustained by United as a result of the October 18, 1957 transaction.

We therefore conclude that the evidence was sufficient to warrant a jury finding against DePinto on the negligence, breach of fiduciary duty, and proximate cause issues raised by what DePinto states to be the controlling charges against him—those set forth in Counts VI and VII of the Doig complaint. It follows that the trial court did not err in denying the motions for a directed verdict, and for judgment notwithstanding the verdict, made on the ground that the evidence was inadequate in this regard.

DePinto next contends that there is no competent evidence on the amount of loss or damage sustained by United as a result of the October 18, 1957 transaction. Accordingly, he urges that the jury verdict was necessarily the result of speculation upon the part of the jury and his motion for judgment notwithstanding the verdict should therefore have been granted.

It is undisputed that, on October 18, 1957, United transferred to American, cash in the amount of $6,794.19, and other assets of United having a face value of $308,000, for which United received 30,800 shares of American common stock. In its instructions to the jury the trial court stated

that, in computing damages, the value of the American stock received by United, as disclosed by the evidence, should be deducted from the jury's findings as to the value of the assets transferred by United. In view of the verdict, the jury presumably determined that the assets transferred by United to American were worth $314,794.19, and that the 30,800 shares of American stock received by United were valueless. DePinto argues that there is no competent evidence that United's transferred assets were worth $314,794.19, nor that the 30,800 shares of American stock received by United were valueless.

There was some evidence tending to indicate that the assets of United, transferred to American, were worth less than $314,794.19, and that the 30,800 shares of American stock received by United were not entirely valueless. However, there was also substantial evidence in favor of plaintiffs in both respects and the jury was entitled to find in accordance therewith. The trial court did not err in holding that the evidence as to damages was not so deficient as to require the granting of DePinto's motion for a judgment notwithstanding the verdict.

DePinto contends that the trial court erred in admitting certain evidence over his objection. Considerable evidence was received pertaining to DePinto's activities prior to the transaction on October 18, 1957, pertaining principally to his record as a director of Underwriters, the complaints heard by him at a meeting of the board of United concerning Kelly's management of that company, DePinto's failure to attend board meetings of United, his lack of knowledge concerning Kelly's resignation as an officer and director of United, and DePinto's general failure to inform himself concerning United's financial condition. DePinto argues that all this evidence is immaterial on the issue of whether any act or omission of DePinto was a proximate cause of the loss to United occasioned by the transaction of October 18, 1957.

In our view all this evidence is relevant to the question of whether DePinto was sufficiently put on notice so that he should have investigated the proposal effectuated on October 18, 1957.

Over DePinto's objection, the trial court allowed into evidence a report of an examination of the affairs of United for the year 1958 made by Guly L. Hammett, an examiner for the Insurance Department of the State of Arizona. DePinto contends that the report is hearsay and not admissible as an official document. In support of this view, he cites *Olender* v. *United States*, 9 Cir., 210 F.2d 795, where it was held that, to be admissible as an official document, the facts stated in the document must have been within the personal knowledge and observation of the recording official or his subordinates. DePinto presumably contends that the report in question contains statements not within the personal knowledge of Hammett or his subordinates.

There is no factual basis for this argument since Hammett testified that the document in question was prepared on the basis of an examination made by himself and another examiner of the agency. Moreover, the second paragraph of 28 U.S.C. § 1732 (1964), providing for the introduction in evidence of records made in the regular course of business, expressly provides that where certain essentials, not here questioned, are met, all other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight ". . . but such circumstances shall not affect its admissibility." See *LaPorte* v. *United States*, 9 Cir., 300 F.2d 878, 881.

We have examined DePinto's additional contentions concerning the admission of items of evidence over his objection and find them to be without merit.

DePinto argues that the trial court erred in upholding plaintiff's objections to several lines of questioning of

some of DePinto's witnesses on direct examination. The witnesses in question were Kelly, Croydon, Eugene Tompane, Niesz, Sabo, James C. Gregory and Landoe. DePinto also asserts that the trial court erred in rejecting DePinto's offer to read into evidence certain "Admitted Facts," as set out in the pretrial order. He argues that these "Admitted Facts," together with the proffered testimony referred to above, give a substantially complete picture of the activities of the Niesz group on and prior to October 18, 1957, with respect to the formation of American and its acquisition of United stock from Kelly. This evidence, DePinto contends, discloses that the Niesz group had no intention of looting United.[5]

DePinto argues that if he had made an investigation of the facts and circumstances surrounding the transaction of October 18, 1957, he would presumably have learned of these background circumstances. He questions how the jury could determine whether DePinto's failure to investigate the circumstances surrounding the transaction of October 18, 1957, was or was not a proximate cause of United's loss without knowing all the facts which such an investigation would have revealed. With the whole picture before it, DePinto contends, the jury might well have concluded that a prudent director would not have refrained from participating in the election of the Niesz group to the board of directors of United.

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[5] DePinto contends that this proffered evidence reveals that each member of the Niesz group was acting pursuant to advice of counsel; that the Director of Insurance and the Director of the Securities Division of the Arizona Corporation Commission had been consulted; that the group mistakenly, but in good faith, thought their plan could be implemented by mortgages furnished through Eugene Tompane pursuant to approved Certificates of Contribution and that Sabo was making a $115,000 investment in the program; and that when United merged with Provident the latter company secured, by means of Certificates of Contribution, mortgages having a value of over $200,000 which were then carried on the books of Provident as assets and part of its surplus.

The testimony in question of Kelly, Croydon, Niesz and Sabo, was first received at the original Gorsuch trial, at which time there were twelve personal defendants in addition to DePinto, and three defendant corporations in addition to United. The claims asserted against some of these other defendants were entirely different from the claims asserted then, and now, against DePinto. For example, in the original Gorsuch trial, it was charged that Sabo, Pegram, Croydon, Ballantyne and Niesz, all members of the board of directors of American, were also members of the board of directors of United on October 18, 1957.[6] Accordingly, it was urged that they were accountable to United for all their acts arising from their association with Kelly and American which may have been detrimental to United.

In order to meet these charges, it was important for these defendants, and also Kelly, to show the background facts in a light favorable to themselves. It follows that evidence of this character was entirely proper at the first trial. However, these defendants are not in the case now before us. Therefore, when it was proposed to read the original testimony into evidence at this DePinto trial, the trial court sustained objections made on the ground of immateriality.

We agree with these trial court rulings. Whatever DePinto might have discovered with reference to these background circumstances, he would still have been under a duty, as a director of United and under the circumstances of this case, to make a reasonable effort to ascertain the details of the plan as ultimately consummated. He made no such effort, and he cannot be excused on the ground that the facts pertaining to the preliminary negotiations would not have provided a warning that the ultimate plan would be prejudicial to United. It follows that, with respect to

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[6] That some of these defendants denied this in the Gorsuch suit is immaterial for present purposes.

the particular dereliction charged against DePinto, a development of the background facts referred to above would not tend to relieve DePinto of liability. The proffered evidence was therefore properly rejected as immaterial.

On the same analysis we agree with the trial court that testimony of the same nature by Tompane and Gregory, offered for the first time at the DePinto trial, and certain "Admitted Facts" pertaining to these background circumstances, were also immaterial and properly excluded.

DePinto also contends that the trial court erred in rejecting testimony with respect to the reputation, integrity and business ability of various members of the Niesz group. DePinto argues that, for the purpose of appraising DePinto's conduct and his relationship to the transaction of October 18, 1957, the jury was entitled to know just what DePinto would have learned had he made an investigation of the Niesz group.

If DePinto had investigated the reputation of the individuals comprising the incoming group, and had reasonably believed therefrom that they were of good reputation, this would not have excused him, in view of all of the circumstances of this case, from making a reasonable investigation of the details of the October 18, 1957 transaction as ultimately transacted. Therefore, the trial court did not err in excluding this evidence.

DePinto asserts that the trial court erred in excluding certain proffered evidence pertaining to the value of the 30,800 shares of American stock which United received. We have examined the nature of the offered testimony and the purposes for which it was offered, and conclude that the trial court did not err in rejecting it.

DePinto argues that the trial court erred in instructing the jury, over his objections, that DePinto had been charged with certain acts or omissions. This instruction is quoted in note 1 above. DePinto asserts that this instruction in-

vited the jury to find DePinto was negligent with respect to acts or missions which had nothing to do with the transaction of October 18, 1957, and concerning which he was not charged under the pleadings.

DePinto overlooks the fact that the pretrial order superseded the pleadings. Plaintiffs' contentions, as set out in that pretrial order, were correctly summarized in the instruction quoted in note 1. Thus DePinto is not correct in asserting that the acts or omissions listed in the instructions are not properly at issue. This instruction is correct even though some of those alleged acts may not have been a proximate cause of the loss sustained by United on October 18, 1957. The matter of proximate cause was dealt with in other instructions to the jury.

DePinto charges the district court with error in regard to several other instructions given over his objection. We have examined each such instance and conclude that the trial court did not err. We also conclude that the trial court did not err in refusing to give several instructions requested by DePinto.

DePinto contends that the trial court erred when, during the jury deliberations, the court answered a particular inquiry which the jury made in writing. The inquiry was for the court to repeat "... the 3 factors to be used in judging for the plaintiff." The court answered, in writing, that the three ultimate issues concerned DePinto's negligence in performing fiduciary duties, proximate cause, and damages. Amplifying the damage issue, the court listed the "... three items of claimed damage ..." as shown in the margin.[7] DePinto argues that this itemization and total-

[7] "The three items of claimed damage are:

1) Cash, by check or bank certificates of deposit—	$166,498.66
2) Promissory notes and accrued interest thereon—	87,626.88
3) Mortgages, bonds and accrued interest thereon—	60,668.65
Total	$314,794.19

ing of the claimed damages volunteered information not requested by the jury, that it departed from the formal instructions, and that it practically invited the jury to render a judgment against DePinto for the total amount, without considering any reduction in that amount to the extent of the value of the shares of American stock received by United.

Our examination of the record indicates that the described itemization of the claimed damages was substantially in accord with a formal instruction, to which no objection is urged on this appeal. It was also germane to the jury's inquiry concerning the ultimate issues, one of which was the issue of damages. Before giving this answer to the jury, the trial judge telephoned DePinto's counsel and the latter then indicated that it would be all right to mention the three ultimate issues, and also the items of claimed damages. No objection was made before the jury brought in its verdict.

Moreover, we do not believe the itemization of damages had the prejudicial effect DePinto ascribes to it. Without evidence to the contrary, it must be presumed that the jury followed the court's original instruction which directed the jury to reduce their final verdict to the extent of the value of American stock received by United.

The trial court did not err in giving the jury this written answer to their inquiry.

DePinto next argues that the judgment is excessive in three respects. One of these pertains to a provision of the merger agreement between United and Provident. The terms of that agreement provide that the net proceeds of any recovery in this stockholders' derivative action would be shared by each former owner of United stock in the proportion that the number of shares held by him bore to the total shares of United issued and outstanding. In accordance with this arrangement, "Certificates of Contin-

gent Interest" were issued to the former stockholders of United.[8]

Pursuant to this plan, the 38,798 shares of United stock held by American were cancelled and all rights therein were relinquished and released. In addition, and in connection with the settlement which plaintiffs made with the executors of the Duhame estate, the latter released and surrendered the right to participate in any recovery herein to the extent of 3,750 shares of United stock.

The American shares and Duhame estates shares in United aggregated 42,548 shares, or roughly 42½% of the 100,000 shares of United outstanding at the time of the merger. DePinto asserts, therefore, that the former holders of United stock who will share in any net recovery herein, represent ownership of only 57½% of United stock originally issued and outstanding. He argues from this that the right of Provident to secure a judgment on behalf of the former United stockholders who will share therein should be limited to approximately 57½% of the total $314,794.19 claim arising from the October 18, 1957 transaction, or $180,856. Failure to reduce the judgment against DePinto to this amount, DePinto contends, would be grossly inequitable and would unjustly enrich the remaining 57½% of United's former shareholders.

In *Provident Security Life Insurance Company* v. *Gorsuch*, 9 Cir., 323 F.2d 839, 846-847, we held that the provision of the merger agreement releasing the net proceeds of this stockholders' derivative action to the former stockholders of United, did not render that agreement invalid. We also made it clear, however, that we were not passing upon the efficacy of that provision which undertakes to transfer these net proceeds from Provident to the former

[8] In the "Certificates of Contingent Interest" it is provided that there shall be deducted from any such net proceeds any recovery against Provident on possible claims which may be asserted against United which are not provided for in the merger agreement.

shareholders of United. In this connection we noted that it might be legally impermissible to effectuate such a transfer because of its tendency to deplete Provident's assets, which should be retained for the benefit of Provident stockholders and policyholders, and others who might be adversely affected. We expressed the view that these matters must be left to future agreement or litigation in which affected persons, not represented in the present suit, may have an opportunity to participate.

It is clear from these observations in our prior decision, to which we still adhere, that it cannot now be ascertained whether there will be any net proceeds from this derivative action for former United shareholders and, of so, whether their respective shares would evidence unjust enrichment. There are additional considerations, suggested by Provident, which add other uncertainties as to whether former United shareholders would be unjustly enriched. We mention only two: a substantial part of the proceeds may be awarded as attorneys' fees and litigation expenses;[9] the dollar recovery which former United shareholders may realize under this provision of the merger agreement, may not measure their full loss, considering that they have lost their equity in a going life insurance company.

While DePinto has cited a number of decisions in support of his position on this branch of the case, we do not find them persuasive under the special circumstances of this case. We hold that the trial court did not err in declining to reduce the judgment on the grounds discussed above.

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[9] The judgment under review shows no such allowance, but in all likelihood provision will be made for attorneys' fees before any proceeds are transferred from Provident to others. In the previous judgment, entered on May 15, 1962, twenty-five percent of the full amount of the actual recovery, or $78,698.56, was allowed for legal services, together with necessary litigation expenses.

A second respect in which the judgment is excessive, DePinto argues, results from the court's failure to credit the judgment against DePinto with the $100,000 Provident received in settlement of its claim against the Duhame estate. DePinto calls attention to Arizona decisions holding that a payment made by one joint tortfeasor must be credited upon the claim against another tortfeasor.

As pointed out earlier in this opinion, three claims were asserted against DePinto and several other defendants in the total amount of $553,353.63. The $100,000 received by Provident from the Duhame estate was allocated by the district court to the first of these claims, a claim of $177,863.84 for losses sustained by United between June 30, 1956 and October 18, 1957. This allocation was in accordance with the express terms of the settlement agreement, the indications being that there would not have been a settlement with the Duhame estate if any substantial part of this $100,000 settlement had been allocated to the $314,794.19 claim for damages sustained by United on October 18, 1957, or the $60,695.60 claim for damages sustained by United between October 19, 1957 and June, 1959.

As a result of that settlement, the entire $177,863.84 claim passed out of the case. Thus DePinto was credited, in effect, in the amount of $177,863.84 against the aggregate of $553,353.63 in claims against him. Under these circumstances DePinto received more than was his due from the settlement with a joint tortfeasor, and no departure from Arizona law occurred. DePinto's contention that the $177,863.84 claim was not in the case at the time of the Duhame estate settlement is without merit. It was set forth in the pretrial order which superseded the pleadings and was not dropped until after the settlement with the Duhame estate.

The trial court did not err in declining to credit the $100,000 Duhame estate settlement to the $314,794.19 verdict returned against DePinto.

DePinto argues that the trial court erred by including, in the judgment, interest at the rate of six percent per annum from October 18, 1957 until payment. He argues that since the judgment is based on an unliquidated claim for negligence and breach of fiduciary duty, interest may be imposed only from entry of the judgment.

We agree. It is not here contended that DePinto benefited from the transaction of October 18, 1957, or that any Arizona statute authorizes the award of interest from the date of the tortious act. Under these circumstances, the Arizona rule permits interest on an unliquidated claim only from the date of judgment. See *Schwartz* v. *Schwerin*, 85 Ariz. 242, 336 P.2d 144, 149; *Cf. Feighner* v. *Clarke*, 2 Ariz. App. 286, 408 P.2d 219, 222. While *Schwartz* involved a claim for attorneys' fees on a quantum meruit basis, we think the Arizona court would apply the same rule with regard to a claim such as that prosecuted against DePinto.

The other contentions advanced by DePinto on this appeal have been examined, and we hold they are without merit.

Plaintiffs have moved in this court for an order requiring the trial court to issue an order directing the United States Marshal to proceed with the sale of real property subject to the judicial lien herein. The motion was made in this court on September 13, 1966, but has been held in abeyance pending determination of this appeal. It is a motion which, but for the pendency of this appeal, should have been addressed to the trial court. We deny the motion without prejudice to its renewal in the trial court upon the remand of this cause.

The cause is remanded with directions to modify the judgment to provide that interest at the rate of six per cent per annum shall run from entry of the judgment on June 28, 1965. The parties will bear their own costs on this appeal. In all other respects the judgment is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,553
DC #2974

ANGUS P. DEPINTO, *Appellant,*
and
JAMES P. DONOHUE as Trustee in Bankruptcy for the Estate of ANGUS J. DEPINTO, *Intervenor-Appellant*
v.
PROVIDENT SECURITY LIFE INSURANCE CO, and ALBERT J. DOIG, *Appellees.*

APPEAL from the United States District Court for the District of Arizona

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that this Cause be, and hereby is remanded to the said District Court with directions to modify the judgment to provide that interest at the rate of six per cent per annum shall run from entry of the judgment on June 28, 1965, in all other respects the said judgment is affirmed, each party to bear his own costs on appeal.

By /s/ WILLIAM E. WILSON
William E. Wilson,
Chief Deputy.

Filed and entered February 24, 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1422

ANGUS J. DePINTO, and JAMES P. DONOHUE, as Trustee in Bankruptcy of the Estate of Angus J. DePinto,
Petitioners,

v.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESONDENTS IN OPPOSITION

OPINION BELOW

The petition adequately sets forth the opinion below.

JURISDICTION

The first order of the Court of Appeals refusing to disqualify Judge Boldt was entered on November 20, 1963. Thereafter, petitioners filed a cross-petition here on January 31, 1964. No review of the said decision of the Court of Appeals was sought in the cross-petition. On March 23, 1964, the Court denied the cross-petition. Petitioners now request review of the judgment of the Court of Appeals entered on February 24, 1967 and raise only the issue of whether the Court of Appeals erred in refusing to disqualify Judge Boldt. Jurisdiction does not exist.

QUESTIONS PRESENTED

Whether the petition is out of time?

Whether the petitioners failed to raise in the Court of Appeals the question they seek to be considered here?

Whether the question presented in the petition is academic?

STATUTE INVOLVED

The petition adequately sets forth 28 U.S.C. § 144.

STATEMENT

U.S. District Judge George H. Boldt, a visiting district judge from the Western District of Washington, is the trial judge with respect to whom the disputed affidavit of bias and prejudice was directed. (App. A, infra, p. 1a) Judge Boldt heard the instant stockholder's derivative action in the District of Arizona during 1960, 1962 and 1965. (O.T. 379, 1756; R.T. 1)*

The complaint, filed November 4, 1958, asserted breach of fiduciary duty and negligence against thirteen individual defendants, eleven of whom, including petitioner DePinto, were residents of Arizona, and two of whom were residents of Montana. (O.T. 223-225) Four of these defendants, including petitioner DePinto, insisted upon a jury trial; petitioner DePinto also challenged the right of the then plaintiff, John S. Gorsuch (Gorsuch), to maintain the action, claiming that a 1960 merger of the then indispensable party corporate defendant, United Security Life (United), an Arizona stock life insurance

* O.T. refers to the four volume transcript of record containing 1873 pages and bound by blue covers. R.T. refers to the two volume transcript of proceedings containing 605 pages and bound by transparent covers. T.R. refers to transcript of record.

corporation, into respondent Provident Security Life Insurance Company (Provident) caused the trial court to lose its jurisdiction of the case. (O.T. 381-386) The demand of petitioner DePinto for a jury trial was made despite a lengthy pretrial conference order in which he stated that there were no issues of any material fact as to him. (O.T. 261)* Since the arguments were heard on the morning of the date set for trial, Judge Boldt ruled that he would reserve decision on the jury trial issue, and empanel a jury whose verdict would be treated as advisory should he rule, after taking time for consideration of the issue, that the defendants were not entitled to a jury trial. (O.T. 392-393)

The trial commenced and consumed eight days. (O.T. 373, 393, 1289)

After the evidence was in, plaintiff moved for a directed verdict under Rule 50 (b). (O.T. 1271) Judge Boldt denied the motion, but specifically reserved the right to rule later after a verdict was returned. (O.T. 1271). Following return of the verdict, he ruled that the defendants were not entitled to a jury trial in a stockholder's derivative action; and, in the alternative, should it be determined that defendants were entitled to a jury trial, he granted judgment notwithstanding the verdict in accordance with plaintiff's previous motion for directed verdict. (O.T. 310-319) In the latter ruling the trial judge found that the verdicts of the jury were not only "against the weight of the evidence but they are unsupported by any evidence whatever and they are not justified by any legal principle." (O.T. 311) He found that "the evidence overwhelmingly establishes

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* No defense on the merits has ever been made by petitioner DePinto as is shown partly by his damaging admissions in the 103 page pretrial order filed June 11, 1965. (T.R. 91).

without a scintilla of evidence to the contrary, that each and all of the individual defendants, including those above named, were *grossly* negligent in every particular of the duties chargeable to them as corporate directors with respect of the transactions resulting in the loss referred to." (O.T. 315)* Judgment in the sum of $314,794.19 was entered against petitioner DePinto and six other defendants, and $308,000 against five defendants. (O.T. 354) Judgment by default in the sum of $308,000.00 had already been obtained against the thirteenth defendant. (Dck. Entry No. 79 dated January 28, 1960).

Petitioner DePinto and four other defendants appealed, claiming, among other things, that they had been entitled to a jury trial and that the 1960 merger of United into Provident took away the district court's jurisdiction to hear the case. (Opening Brief of Appellant DePinto, No. 17114, p.36-46) Plaintiff responded directly to the jury argument, and also argued that the motion for a directed verdict was properly granted making the question of whether defendants were entitled to a jury trial irrelevant. (Opening Brief of Appellee Gorsuch, No. 17114, p. 33-37) The only reply thereto was from petitioner DePinto who merely said "the undisputed facts, in the light of applicable legal principles compels a judgment" for him. (Reply Brief of Appellant DePinto, No. 17114, p.12)

In 1961 the Court of Appeals reversed *solely* on the ground that the merger had deprived Gorsuch of his right to sue and United of its right to be sued, and

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*The Court of Appeals, in its third opinion, which affirmed the third consecutive $314,794.19 judgment against petitioner DePinto, referred to the transaction as a "fraudulent scheme." (Pet., p. 11a)

remanded the case to Judge Boldt to provide an opportunity for Provident to join or be joined.* 295 F.2d 909. It also said:

> "If, upon remand the district court concludes that the parties are reconstituted and realigned in such manner as to cure the difficulty caused by United's merger with Provident, it would then be *in its discretion* whether the case *should be reopened* for the taking of further evidence and the submission of additional argument on the merits. Based on the original record herein and upon such further proceedings *as to the trial court may seem appropriate*, substituted or supplementary findings of fact and conclusions of law may be entered, followed by judgment - - -" (O. T. 1428-1429) (Emphasis supplied)

In addition, the Court of Appeals directed the trial judge to make further "findings of fact on several matters of importance." (O.T. 1429)

Upon remand, in 1962, Judge Boldt used his discretion to give all parties an opportunity to put on "any evidence" each considered appropriate under the Court of Appeals decision. (O.T. 1761, 1764-1765, 1796) He held pretrial conferences, heard oral argument on numerous motions and received evidence with respect thereto, and conducted a further hearing on the case at which evidence was received.** (O.T. 1494-1562, 1633-1635, 1756-1819) At the beginning of the hearing petitioner

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* Petitioners' statement of the case that this reversal was "*Principally* on the ground of the consequences of a certain merger" is therefore not accurate. (Pet., p. 4)

** The Court can judge, in light of the quoted portions of the opinion of the Court of Appeals and the willingness of Judge Boldt to accept any evidence tendered by the parties, the accuracy of petitioners' statement of the case that the "trial court, instead of allowing the matter to be tried, merely readopted its original findings of fact and reaffirmed his earlier decisions." (Pet., p. 5)

DePinto renewed his motion "for judgment based on the original jury verdict, and in the alternative, for a jury trial." (O.T. 1796) After supplementary findings of fact and supplementary conclusions of law were filed by Judge Boldt (O.T. 1712-1745), a second judgment in the sum of $314,794.19 was entered against petitioner DePinto and the four other defendants, none of whom had offered any evidence on the merits. (O.T. 1746-1749, 1815-1816, 1796-1819)

Petitioner DePinto and the remaining four defendants again appealed. The Court of Appeals, in 1963, then reversed Judge Boldt on the grounds that such defendants had been entitled to a jury trial in 1960, and that under the Seventh Amendment a district judge lacks the power to grant a motion for a directed verdict for a plaintiff under Rule 50 (b) in an amount in excess of the jury's subsequent verdict. 323 F.2d 826. The Court of Appeals did not review the evidence to find out whether the district court had erred in its 1960 finding that there was no genuine factual issue as to petitioner DePinto's liability and as to the amount of the damages. It then remanded the case to the district court for a new trial before a jury.

After the second opinion of the Court of Appeals was entered on October 31, 1963, petitioner DePinto filed a petition for a rehearing in which he also moved the Court of Appeals to disqualify Judge Boldt on the ground that the latter had made adverse rulings which had been reversed twice. (App. B, infra, p. 10a) The petition to disqualify was denied on November 20, 1963. (App. C, infra, p. 15a) Thereafter, in 1964, respondent Doig filed a petition for a writ of certiorari with respect to the jury trial and Rule 50(b) decision of the Court of Appeals (Provident Security Life Insurance Company,

et al. v. Angus J. DePinto, et al., October Term, 1963, No. 709), and on January 31, 1964, the petitioner DePinto filed a cross-petition. No review was sought in such cross-petition of the denial by the Court of Appeals of petitioner DePinto's petition to disqualify Judge Boldt. On March 23, 1964, this Court denied both the petition for a writ of certiorari and the cross-petition. 376 U.S. 950.

Subsequently, after remand to the district court, and while a motion by plaintiff for partial summary judgment as to liability only was pending, petitioner DePinto filed the subject affidavit of bias and prejudice against Judge Boldt. (App. A, infra, p. 1a) The motions with respect to the affidavit were assigned to U.S. District Judge Carl A. Muecke in the District of Arizona. Judge Muecke held a hearing, and ruled adversely to petitioner DePinto (App. D, infra, p. 16a) Later Judge Boldt denied plaintiff's motion for partial summary judgment as to liability only, and ordered the case tried to a jury.

In 1965, after a 103 page pretrial order had been agreed upon by the remaining defendants and plaintiff two weeks prior to the trial (R.T. 127-128), petitioner DePinto and the other four defendants refused to sign the order in its entirety a day before the trial was scheduled to begin. (R.T. 122-125, 128-129) Several minutes later, petitioner DePinto conceded that the only portion thereof which he disputed was the last paragraph. (R.T. 129) His counsel then signed the order.* (T.R. 91)

*The Court can judge, in light of the refusal to sign the order after it had been agreed on several weeks earlier and the full discussion between the trial court and the counsel for all parties cited above, the accuracy of the footnote statement in the petition that in "connection with settling the pretrial order, counsel for petitioner refused to agree to a *certain matter*" followed by the quoted remarks of Judge Boldt. (Pet., p. 7)

The case was then tried to a jury.

Among the many instructions given to the jury, to which no objection was made by petitioner DePinto, was the following:

> "The claimed items and amounts of assets transferred to Kelly consist of cash by check or bank certificates of deposit in the sum of $166,498.66; second, promissory notes and accrued interest thereon, totaling $87,626.88, and third, mortgages, bonds, and accrued interest thereon in the amount of $60,668.65." (R.T. 587)

Within an hour and a quarter after the jury retired, it sent the following question to Judge Boldt:

> "If the jury find in favor of the Plaintiff, is Dr. DePinto responsible for the full amount or whatever the jury specifies?" (T.R. 236, 292)

Thereupon, Judge Boldt consulted with and obtained the approval of counsel for plaintiff and petitioner DePinto to the following answer:

> "The full amount of damages sustained as found by the jury." (T.R. 293)

Later the jury sent the following communication to the district judge:

> "1. Jury wishes a repeat of the 3 factors to be used in judging *for* the plaintiffs." (T.R. 237) (Emphasis supplied)

Thereafter, the answer to be given was discussed and approved by counsel for plaintiff and petitioner DePinto, and was as follows:

> "Answering your first inquiry:
>
> The three (3) ultimate issues are:
>
> 1) Was defendant DePinto negligent in performing

his fiduciary duties in one or more of the particulars asserted by plaintiffs? If so,

2) Did such negligence of defendant DePinto proximately cause or contribute to causing loss or damage to United Security Life? If so,

3) What was the amount of such loss or damage?

The three items of claimed damage are:

1) Cash, by check or bank certificates of deposit—	$166,498.66
2) Promissory notes and accrued interest thereon—	87,626.88
3) Mortgages, bonds and accrued interest thereon—	60,668.65
Total—	$314,794.19"

(T.R. 238)

When the general verdict of the jury in the sum of $314,794.19 was returned, petitioner DePinto's counsel was in the courtroom, and made no statement or objection respecting either answer of the trial court to the jury. In a later memorandum in support of a motion for judgment in accordance with motion for directed verdict filed in the district court, petitioner DePinto's counsel conceded with respect to the second answer that he had "indicated to the Court that it would be *all right* to mention the three factors—negligence, proximate cause and damages, *and also the items of claimed damages.*"*

Judge Boldt entered the third consecutive $314,794.19 judgment against petitioner DePinto in accordance with the general verdict of the jury on June 28, 1965. (T.R. 235, 262) Since petitioner DePinto and plaintiff had agreed that the issue of from what date interest should

* Is it accurate for petitioners to say, with respect to this second answer to the jury, that Judge Boldt "*gratuitously* amplified the damage issue? (Pet., p. 7)

run was to be decided by the district court, Judge Boldt ruled with respect thereto and awarded interest from the date of United's loss on October 18, 1957. (T.R. 91, 168, 257) He relied on *Miller v. Robertson*, 266 U.S. 258 (1924) and *Concordia Ins. Co. v. School Dist. No. 98*, 282 U.S. 545 (1931). (T.R. 257)

Petitioner DePinto appealed. Thereafter James P. Donohue, Trustee in Bankruptcy of the Estate of Angus J. DePinto, was allowed to intervene. The Court of Appeals affirmed the judgment but disallowed interest prior to June 28, 1965. 374 F.2d 37. In affirming the judgment it discussed at length and rejected petitioners' arguments concerning the trial judge's answer to the jury's second question. (Pet., App. A, p.18a-19a) Petitioners' application for a rehearing was denied on March 29, 1967.

ARGUMENT

Petitioners have: (1) first *assumed* that the courts below relied on the principle that in the federal practice there can be no bias developing from a pattern of rulings and from repeated reversals, (2) expressly asked the Court "not to immerse itself in the facts to determine whether or not the trial judge should have been disqualified", and (3) then requested the Court to "affirm the principle that reversed adverse rulings can, under appropriate circumstances, constitute the basis for an effective affidavit of bias and prejudice." (Pet. p. 9, 15)

1. Petitioners' Application For A Writ Of Certiorari Is Out Of Time.

The question raised in the petition is presented three years and four months too late. The second opinion and

judgment of the Court of Appeals was entered on October 1, 1963. 323 F.2d 826. Petitioner DePinto filed a petition for rehearing on or before October 29, 1963, in which he moved the Court of Appeals to disqualify Judge Boldt from proceeding further on the ground that the latter had made rulings adverse to petitioner DePinto and had been reversed twice. (App. B, infra, p. 10a) The petition was denied on November 20, 1963. (App. C, infra, p. 15a) Thereafter, in 1964, respondent Doig filed a petition for a writ of certiorari here (Provident Security Life Insurance Company, et al. v. Angus J. DePinto, et al., October Term, 1963, No. 709), and on January 31, 1964, the petitioner DePinto filed a cross-petition. No review was sought in such cross-petition of the denial by the Court of Appeals of petitioner DePinto's petition to disqualify Judge Boldt. Having raised on appeal in 1963 the question of disqualification of Judge Boldt for bias, petitioner DePinto could not raise the question again after the case was thereafter remanded for a new trial. *Peckham v. Ronrico Corp.*, 288 F.2d 841, 843 (1st Cir. 1961). Thus, it was incumbent upon petitioner DePinto to assert in his 1964 cross-petition here any alleged error respecting the denial by the Court of Appeals of his petition to disqualify Judge Boldt in order to avoid the finality of said order. On March 23, 1964, this Court denied both the petition and the cross-petition. 376 U.S. 950. On November 20, 1964, petitioner DePinto filed the disputed affidavit (App. A, infra, p. 1a) Thus, petitioner's application for a writ of certiorari is out of time and should be denied.

2. Petitioners Did Not Raise In The Court Of Appeals The Only Question Sought To Be Considered Here.

The question raised in the petition was not raised in

the Court of Appeals. There the petitioners argued merely that the affidavit was timely, and that:

> "We submit that, under the provisions of 28 U.S.C.A. § 144, the filing of the Affidavit of Bias or Prejudice deprived Judge Boldt of all right, power or authority to take any further action in the case. So far as DePinto is concerned, it is *immaterial* why such bias developed or *how it is demonstrated* . . . " (Opening Brief of petitioners in C.A. 9 at p. 65, No. 20553) (Emphasis supplied)

That is, petitioners contended in the Court of Appeals that the *mere filing* of a Section 144 affidavit of bias and prejudice disqualifies a district judge. Therefore, having failed to present to the Court of Appeals the question raised in the petition here, the petitioners are precluded from doing so now. *California v. Taylor*, 353 U.S. 553, 556-557, n. 2 (1957)

3. The Instant Case Does Not Raise The Question Of Whether Reversed Rulings Can Under Appropriate Circumstances Constitute The Basis Of An Effective Affidavit Of Bias And Prejudice, And, If It Did, The Reversed Rulings Here Would Not Support A Finding Of Bias Based Thereon.

The foundation on which the entire petition rests is the incorrect statement that the "courts below have operated on the assumption that in the federal practice there can be no bias developing from a pattern of rulings and from repeated reversals." (Pet., p. 9). Thereupon petitioners ask for a review of this "assumption," and suggest there is a conflict among the courts of appeals with respect thereto.

However, Judge Muecke, to whom the hearing on the affidavit to disqualify Judge Boldt was assigned, ex-

pressly disavowed that his decision was based on such a rule. (App. D, infra, p. 16a) Instead, he ruled that the affidavit was not sufficient for the *reasons* that it: (1) failed to show facts to indicate personal bias, (2) was untimely, and (3) had in substance already been denied by the Court of Appeals. (App. D, infra, p. 16a) Thereafter, petitioners contended in the Court of Appeals, in both their briefs and specifications of error, *only* that the mere fact of filing the affidavit disqualified Judge Boldt and that it had been timely filed. Not a single sentence was advanced to the Court of Appeals claiming that there can be bias developing from a series of reversed rulings. Consequently, the Court of Appeals did not rule, was not required to rule, and did not operate on the assumption that in federal practice there can be no bias developing from a series of reversed rulings. That being the case, the decision of the Court of Appeals can be in conflict neither with a decision of another circuit on the matter of whether bias can be based on a pattern of reversed rulings nor with the principles or reasoning thereof. It also follows that this case cannot raise the "important" and "unsettled" question of law which petitioners desire resolved.

A second reason why petitioners seek only an academic discussion of the law respecting whether there can be legally sufficient bias developing from reversed adverse rulings is shown by their statement that:

> "We do not ask this Court to immerse itself in the facts to determine whether or not the trial judge should have been disqualified." (Pet., p. 9)

Such statement, along with the failure of the petition to enlighten the Court respecting the specifics of the reversed rulings, constitutes a request that the Court order the Court of Appeals to hold a hearing without

first being satisfied that there are some reasonable grounds to believe that the particular reversed rulings would support a finding that Judge Boldt was biased. Yet even a cursory examination of those reversed rulings compels the conclusion that the Court of Appeals could never decide that they showed bias by Judge Boldt.

The first reversed ruling of Judge Boldt, made in 1960, was directed to petitioner DePinto's contention that the then plaintiff, Gorsuch, no longer had the capacity to maintain the action because the indispensable party corporate defendant, United, had been merged into respondent Provident a year or two after the trial court had acquired jurisdiction. Plaintiff contended that the merger had been brought about by the defendants, and that since the trial court's jurisdiction depends upon the state of things at the time the action was brought, its jurisdicion cannot be ousted by subsequent events. See *Mollan v. Torrance*, 9 Wheat. 537. Judge Boldt sustained plaintiff. The Court of Appeals, in 1961, held, without ruling on the merits of the case, that upon completion of the merger, Gorsuch lost his capacity to sue and United its capacity to be sued, and remanded the case to Judge Boldt to afford an opportunity for Provident to join or be joined. It also specifically directed Judge Boldt to make *further "findings of fact* on several matters of importance." 295 F.2d 909. Is it likely that any court of appeals would so remand a matter and at the same time be able to conclude that the trial judge's ruling showed bias?

The second reversed ruling of Judge Boldt, also made by him in 1960, was that the parties are not entitled to a Seventh Amendment jury trial in a stockholder's derivative action, and that by reserving decision under Rule

50 (b) on a plaintiff's motion for directed verdict, a district court has the power to enter judgment notwithstanding the verdict in plaintiff's favor in an amount in excess of the jury verdict. The Court of Appeals, in 1963, after it had remanded the case to Judge Boldt in 1961 for further findings of fact, reversed and held for the first time in this country that the parties are entitled to a jury trial in a stockholder's derivative action. 323 F.2d 826. It also held, without reviewing the evidence, that the Seventh Amendment forbids a district court from entering judgment notwithstanding the verdict under Rule 50 (b) in an amount in excess of the jury verdict. The 1964 petition for a writ of certiorari with respect to such rulings was then filed here with Professor James Wm. Moore appearing on behalf of plaintiff. In 1965 a Yale Law Journal Note concluded that the said jury trial decision of the Court of Appeals herein was a "striking misapplication" and "unwarranted extension of the seventh amendment." See Note, The Right To A Jury Trial In A Stockholder's Derivative Action, 74 Yale L.J. 725 (1965). Could it be found that these two reversed rulings of Judge Boldt were so "erroneous" as to support a finding that he was biased against petitioners? Professor Moore did not think they were erroneous rulings at all.

The third reversed ruling of Judge Boldt,* made in 1965 at the third trial, and which ruling is now pending here,** cited *Miller v. Robertson*, 266 U.S. 258 (1924) and *Concordia Ins. Co. v. School Dist. No. 98*, 282 U.S.

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* The relevance of such third reversed ruling to the question presented is difficult to discern, but it has been referred to in the petition at p. 9.

** Provident Security Life Insurance Company, et al. v. Angus J. DePinto, et al., October term, 1966, No. 1406.

545 (1931), as authority. It was that in the absence of an authoritative state decision to the contrary, the district court, even in a case of unliquidated damages, can, in the exercise of a sound discretion, include interest as an element of damages when necessary in order to arrive at fair compensation. The Court of Appeals reversed, relying on what it *thought* the Arizona Supreme Court *would* apply as the rule with respect to the kind of claim made against petitioner DePinto. 374 F.2d 37. The pending petition shows that the Court of Appeals was forced to make a judgment as to what it thought the Arizona Supreme Court *would* rule because it too could find no authoritative Arizona decision *to the contrary*, and therefore it contravened *Miller v. Robertson, supra*, and *Concordia Ins. Co. v. School Dist. No. 98, supra*. Was this ruling by Judge Boldt so erroneous that it would support a finding that he was biased?

4. The Question Presented In The Petition Is Not Unsettled.

The question presented by the petition, irrelevant as it is in the context of this case, is not unsettled. A long line of cases have established the principle that reversed adverse rulings cannot constitute the basis for disqualification of a district judge under 28 U.S.C. § 144. *United States v. Grinnell Corporation*, 384 U.S. 563, 583 (1966); *Berger v. United States*, 255 U.S. 22, 33-34 (1922); *Ex parte American Steel Barrel Co.*, 230 U.S. 35 (1913); *Lyons v. United States*, 325 F.2d 370, 375 (9th Cir. 1963), cert. den, 377 U.S. 969; *Deitle v. United States*, 302 F.2d 116, 118 (7th Cir. 1962); *Martin v. United States*, 285 F.2d 150, 151 (10th Cir. 1960), cert. den. 365 U.S. 853; *Gallarelli v. United States*, 260 F.2d 259 (1st Cir. 1958); *United States v. Garden Homes*, 113 F. Supp. 415 (D.C. N.H.), affirmed per curiam, 210 F.2d 281 (1st Cir. 1954);

United States v. 16,000 Acres of Land, 40 F. Supp. 645 (D.C. Kan.).

Petitioners have cited no cases contra.

5. There Is No Conflict Between The Claimed Principle Of The Decision Below And The Decisions Cited By Petitioners As Being In Conflict Therewith.

Assuming that the underlying principle of the decision below were that there can be no bias developing from a series of reversed rulings, the three cases cited by petitioners are not in conflict therewith. In none of said cases, *Knapp v. Kinsey*, 232 F.2d 458 (6th Cir. 1956); *United States v. Ritter*, 273 F.2d 30 (10th Cir. 1959) and *United States v. Drumm*, 329 F.2d 109 (1st Cir. 1964), was the disqualification of the trial judge from further proceeding in the matter upon remand predicated upon a finding of bias and prejudice based on reversed adverse rulings of the trial judge. In all of the said cases, the court of appeals' conclusion that the trial judge had been biased and prejudiced was based upon his conduct and/or remarks made during the trial, or the manner in which he had questioned witnesses. That is, it was specific conduct of the trial judge during the proceedings which caused the court of appeals to conclude he had been biased and prejudiced. Indeed *Knapp v. Kinsey*, *supra*, cited with approval the rule that "Adverse rulings during the course of the proceedings are not by themselves sufficient to establish bias and prejudice." Thus, petitioners have overlooked the distinction between a case in which bias is based on reversed adverse rulings and one in which it is based upon the conduct or remarks of the trial judge. A decision based on the former ground cannot be said to be in conflict with

decisions based upon the latter ground. In addition none of the cases cited by petitioners involved an affidavit filed under 28 U.S.C. § 144.

6. The Court Should Not Override The 1948 Decision Of Congress Not To Change The Law.

When Congress, in 1948, redrafted Judicial Code § 21, 28 USCA § 25, 7 FCA title 28, § 25, and enacted 28 U.S.C. § 144, the then-existing law provided: "The alleged bias and prejudice to be disqualifying must stem from an extra-judicial source and, therefore, adverse rulings during the course of the proceedings are not sufficient to establish bias and prejudice." *Berger v. United States,* 255 U.S. 22 (1922). Since Congress did not change the substance of the predecessor to 28 U.S.C. § 144 or the interpretation which had been placed upon it by the courts, it must be concluded that it acquiesced in the judicial construction thereof. *Cammarano v. United States,* 358 U.S. 498 (1959); *United States v. Ryan,* 284 U.S. 167 (1931). The Court should not override the decision of Congress to re-enact the then-existing law substantially unchanged. *Hanover Bank v. Commissioner,* 369 U.S. 672 (1962). Nor may petitioners avoid this rule by classifying the hypothetical question presented in the petition as "a matter of practice and procedure." (Pet., p. 18).

7. The Rule That Reversed Rulings Cannot Support An Affidavit Of Bias And Prejudice Under 28 U.S.C. § 144 Should Not Be Changed.

28 U.S.C. § 144 permits a party to effect the disqualification of a district judge upon the filing of a "timely" and "sufficient" affidavit that the judge has a "personal bias" either against him or in favor of an adverse party.

The term "personal" excludes official or judicial, and probably explains why this Court said in 1966 that the bias "must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corporation,* 384 U.S. 563 (1966). The rule petitioners seek would contradict the language of the statute, and encourage more attacks upon district judges such as those found in the petition.

Petitioners have made an extremely unfair attack upon the integrity and good judgment of Judge Boldt through the indirect methods of footnotes,* innuendo, omission, misstatement, and finally by the erroneous statement, at pages 17 and 18, without citation to any part of the record, that some of Judge Boldt's comments are close to his having publicly attacked petitioner DePinto's personal honor and integrity. More of this kind of attack can be expected from losing litigants once the doors are opened by a rule requiring hearings on whether a series of reversed adverse rulings plus "appropriate circumstances" disqualify a district judge.

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* One of these footnote supports for petitioners' claim of bias here is actually another lawsuit in which neither of the petitioners was a party. Provident Security Life Insurance Co. v. Gorsuch, 323 F. 2d 839 (9th Cir. 1963). (Pet., p. 5) Another footnote support is an extremely misleading account of Judge Boldt's comments in 1960 to counsel for another party. (Pet., p. 4) (See O.T. 1211-1215 showing that counsel for the defendant Niesz had violated a clear ruling, observed by all other counsel, not to refer to the merger before the jury)

CONCLUSION

The decision below is correct. There is no conflict of decision and no other reason for review by this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

William Lee McLane
Nola McLane
Thaddeus Rojek
111 West Monroe Street
Phoenix, Arizona

Harold E. Kohn
William T. Coleman, Jr.
2600 Fidelity-Philadelphia
Trust Building
Philadelphia, Pennsylvania

F. R. Crable
Bank of Arizona Building
Phoenix, Arizona

June, 1967.

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 2974 - Phx.

ALBERT J. DOIG, on Behalf of Himself and All Other Shareholders of Provident Security Life Insurance Company, *Plaintiff*

v.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, UNITED SECURITY LIFE, ANGUS J. DEPINTO, ELMER W. DUHAME, FRANCIS I. SABO, EDWIN B. PEGRAM, AND HJALMAR B. LANDOE, *Defendants.*

AFFIDAVIT OF BIAS OR PREJUDICE

STATE OF ARIZONA
County of Maricopa, ss:

ANGUS J. DePINTO, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action and makes this Affidavit pursuant to the provisions of 28 U.S.C.A., § 144; that the Honorable George H. Boldt, before whom this matter is pending, has a personal bias or prejudice either against Affiant or in favor of Plaintiff; that the facts and the reasons for Affiant's belief that bias or prejudice exists are as follows:

Upon the original trial of this action the jury rendered a special verdict wherein it found that Affiant was not guilty of negligence or breach of fiduciary duty which proximately caused or contributed to cause loss and damage to United Security Life, the predecessor in interest of Provident Security Life Insurance Company.

Plaintiff moved that all of the verdicts be set aside and that judgment be entered against Affiant and others in accordance with plaintiff's Motion For a Directed Verdict, which was made at the close of the testimony. Judge Boldt refused to give effect to the jury verdict and granted judgment for the plaintiff N.O.V. He erroneously refused to recognize the verdict of the jury as having any binding effect.

During the trial, the defendants offered in evidence a Merger Agreement pursuant to which United Security Life had been merged in Provident Security Life Insurance Company after the filing of the action. Judge Boldt rejected the offer and held that there was no issue as to the merger and that any evidence with respect thereto was irrelevant and immaterial. When Mr. Rehnquist, an attorney for one of the defendants, attempted to pursue the matter, he was charged by Judge Boldt with contempt and with attempting to pettifog deliberately and with malice aforethought.

After entry of judgment, Affiant filed a motion for new trial raising numerous legal questions and also pointing out specific errors in the findings of fact entered by Judge Boldt. The Judge apparently gave little, if any, consideration to the motion, notwithstanding the fact that Finding No. 19(d) was contrary to the undisputed evidence.

After the Judgment was reversed by the Court of Appeals for the Ninth Circuit in Cause No. 17114 and the case was remanded to the District Court for further proceedings, Judge Boldt again failed to give objective consideration to the legal and factual questions raised by Affiant. At a pretrial conference held on March 9, 1962, Judge Boldt admonished attorneys for the defendants

that they should not "go shopping" for another judge; that he intended to stay with the case until its conclusion. Insofar as known to Affiant, this warning was wholly unprovoked.

Affiant moved that Judgment be entered in his favor upon the jury's verdict and in the alternative demanded a trial by jury of all of the issues herein. The motion was summarily denied. Notwithstanding Affiiant's objections, Judge Boldt entered supplemental findings of fact and conclusions of law wherein he failed to correct or modify his original Finding No. 19(d) which was contrary to the evidence. In addition to again entering Judgment against Affiant in the amount of $314,794.19, Judge Boldt erroneously elected to include interest thereon from October 18, 1957, which had the effect of increasing Affiant's liability to the extent of approximately $100,000. The second judgment was reversed by the Court of Appeals, in Cause No. 18245.

After the remand of this case to the lower court following the first appeal, Gorsuch filed an action against Provident Security Life Insurance Company for the purpose of attempting to set aside the merger of United Security Life with Provident. In that case Judge Boldt denied a Motion For Summary Judgment filed on behalf of Provident. He then granted plaintiff's Motion For Default and Motion For Summary Judgment. Provident's Motion to have the default set aside was denied. The Court of Appeals held that the failure of Judge Boldt to grant Provident's Motion to open the default was an abuse of discretion. The Court of Appeals also held that Judge Boldt had erred in at least four particulars in entering Judgment setting asde the merger.

On the 24th day of September, 1964, Affiant's attorney,

Jos. S. Jenckes, Jr., transmitted to Judge Boldt a letter requesting that he consent to the transfer of this case to another Judge, a copy of such letter being attached hereto as Exhibit "A", and by reference incorporated herein. On October 9, 1964, Judge Boldt wrote a letter to Mr. Jenckes in which he rejected such request, a copy of which letter is attached hereto as Exhibit "B", and by reference incorporated herein.

On the 13th day of April, 1964, attorneys for plaintiffs filed herein a Motion For Summary Judgment on Issue of Liability Only. Notwithstanding the fact that the granting of such Motion will be in derogation of and contrary to the mandate and decision of the Court of Appeals For the Ninth Circuit (*DePinto v. Provident Security Life Insurance Company*, 323 F. 2d 826), requiring a new trial before a jury, Judge Boldt has issued a Memorandum dated November 9, 1964, a copy of which is attached hereto as Exhibit "C", and by reference incorporated herein, which Memorandum discloses that Judge Boldt intends to consider said Motion For Summary Judgment on the merits.

It is Affiant's belief that Judge Boldt is not able to consider the issues involved in this action with an open mind. The record demonstrates the inability of Judge Boldt to view the affairs of United Security Life with that degree of judicial detachment and objectivity which should govern all actions of a trial judge.

Affiant believes that in the light of *Whitaker v. McLean* (C.A., D.C.) 118 F. 2d 596, and *U.S. v. Ritter* (10th Cir.) 273 F. 2d 30, this Affidavit is timely and within the purview of 28 *U.S.C.A.*, § 144.

s/ Angus J. DePinto
Angus J. DePinto

Subscribed and sworn to before me this 20th day of November, 1964.

My commission expires: Mar. 4, 1968, Alice J. Fitch, Notary Public

(N.S.)

CERTIFICATE OF COUNSEL

JOS. S. JENCKES, JR., counsel for Angus J. DePinto, hereby certifies that the foregoing Affidavit is made in good faith.

JOS. S. JENCKES, JR.
Jos. S. Jenckes, Jr.

[Certificate of Service]

EXHIBIT A

September 24, 1964

The Honorable George H. Boldt
United States District Judge
United States Courthouse Building
Tacoma, Washington

Re: Gorsuch & Doig v. Provident Security & DePinto & Duhame - Civil No. 2974, Phx.

Dear Judge Boldt:

I have received copy of Lee McLane's letter to you of September 20, 1964. As you are no doubt aware, it is my feeling that so far as DePinto is concerned, you have not been able to consider the issues involved in the above-mentioned action with complete objectivity. It should be fair to point out that your rulings in this case and in the companion case of Gorsuch v. Provident

Security Life Insurance Company have been consistently erroneous. Certainly this could not be expected from a Judge of your calibre and reputation had you been able to view the position of DePinto in proper perspective.

In all fairness to my client, I must urge that you consent to the transfer of the case to another Judge. Needless to say, this is a difficult letter for me to write in view of my high regard for your judicial capabilities and personal integrity. On the other hand, I would be derelict in my duty to my client if I didn't make this appeal to your sense of fairness.

Mr. McLane refers to the pending action of Fireman's Fund v. Duhame, DePinto, et al., Civil No. 5204 Phx. I assume that you have no responsibility with respect to that action.

With kindest personal regards,

Sincerely,

JSJ;af
cc: Messrs. McLane, Otto, Crable,
Gary and Drysdale, Anderson & Sabo

EXHIBIT B

UNITED STATES DISTRICT COURT
Western District of Washington

Chambers of
GEORGE H. BOLDT
United States District Judge
Tacoma, Washington

New York City
October 9, 1964

Mr. Jos. S. Jenckes, Jr.
363 North First Avenue
Phoenix, Arizona 85003

Re: Gorsuch & Doig v. Provident Security
and DePinto & Duhame - Civ. 2974 Phx.

Dear Mr. Jenckes:

Since mid September I have been heavily engaged in court assignments in the East and am now in a trial here that probably will not be concluded for several weeks. These circumstances account for the delay in my receipt of and response to your letter of September 24.

While I am not in the slightest offended at your request that I consent to a transfer of the above-captioned case to another judge, in good conscience I cannot agree thereto either as a personal matter or in the interests of sound judicial administration. I am not aware of any basis in fact for your feeling that I have not been or hereafter will not be completely objective in considering any matters in the case relating to your client DePinto or to any other party or attorney involved. I have no personal acquaintance with any litigant and all I know of the case is from the files and record made in open court.

In my opinion the reversal of several of my rulings in no manner indicates that I am not "able to view the position of DePinto in proper perspective." In the appellate brief for DePinto on the second appeal the request you now make to me was submitted to the Court of Appeals. I have no information, other than what appears in the opinion, but since no affirmative action was taken on your request, presumably it was considered and denied by the Court of Appeals. Nevertheless, please feel free to file any formal application you may wish to

submit to either the district or appellate court and be assured that, so far as I am concerned, neither you nor your client will be prejudiced thereby.

The clerk advises that the summary judgment motion in Civ. 5204 has been set for hearing before Judge Craig on October 12 from which it would appear your assumption that I have no responsibility in that action is correct.

Your letter and copy of this response are forwarded to the clerk for filing in the above-numbered cause.

Personal greetings and good wishes,

Sincerely
George H. Boldt
United States District Judge

CC-Messrs. McLane; Otto; Crable; Gary; and Drysdale, Anderson & Sabo; Clerk

EXHIBIT C

Memorandum

Room 2090 U.S. Courthouse
Philadelphia, Pa.
November 9, 1964

TO: Messrs. McLane; Jenckes; Otto; Crable; Gary; Drysdale, Anderson & Sabo

FROM: Judge George H. Boldt

SUBJECT: Gorsuch & Doig v. Provident Security & DePinto & Duhame - Civil No. 2974 Phx.

From the several responses to my 10/29/64 memo it appears all counsel responding would be convenienced by

fixing hearing on plaintiff's motion for partial summary judgment and other matters pending in the above cause to commence 10:00 a.m. December 2, 1964. It is now so ordered.

Plaintiff's counsel are directed to serve and file on or before 11/23/64 an exhibit or memorandum setting out the particular evidence of record on which the motion for partial summary judgment is based. Each defendant is directed to serve and file on or before 10/30/64 an exhibit or memorandum setting out any particular evidence of record on which defendant relies in opposition to said motion.

Memoranda in support of any other motion or matter to be considered at the hearing shall be served and filed on or before 11/23/64 and opposition memoranda shall be served and filed on or before 11/30/64.

George H. Boldt
United States District Judge

APPENDIX B

In the United States Court of Appeals
For the Ninth Circuit

No. 18245

ANGUS J. DEPINTO, HJALMAR B. LANDOE, FRANCIS I. SABO AND EDWIN B. PEGRAM, ELMER W. DUHAME, *Appellants*,

v.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, AND JOHN S. GORSUCH AND ALBERT J. DOIG, *Appellees*.

Petition of Angus J. DePinto for Rehearing

Comes now Appellant, Angus J. DePinto, and, pursuant to Rule 23 of the Rules of this Court, respectfully petitions for a rehearing of this cause and requests that upon such rehearing the judgment of this Court shall be modified as follows:

(1) That this cause shall be remanded to the United States District Court for the District of Arizona with instructions to enter judgment for Appellant, Angus J. DePinto.

(2) That in the event this cause is remanded to the United States District Court for the District of Arizona for a new trial, further proceedings herein shall be heard by a judge, other than the Honorable George H. Boldt, to be designated by the Chief Judge of this Circuit pursuant to Section 292(b), Title 28, U.S.C.

This Petition is based upon the following grounds:

A. Request That Lower Court Be Instructed to Enter Judgment for Appellant.

Upon the original trial of this action the jury rendered

a verdict against Niesz, Sabo, Pegram and Landoe in the amount of $20,000.00. The jury rendered a special verdict wherein it found that DePinto was not guilty of negligence or breach of fiduciary duty which proximately caused or contributed to cause loss and damage to United Security Life. (Tr. 304) Plaintiff moved that all of the verdicts be set aside and that judgment be entered against DePinto and others in accordance with plaintiff's Motion For a Directed Verdict which was made at the close of the testimony. (Tr. 306) Plaintiff did not join with his Motion For Judgment a Motion For New Trial, nor did he pray for a new trial in the alternative. Judgment was entered pursuant to plaintiff's Motion. (Tr. 354)

In its opinion herein, this Court states:

> "While appellees did not move for a new trial, and the trial court did not purport to grant one, the necessary effect of the order setting aside the verdict was, for the reasons indicated, to grant a new trial. Accordingly, we cannot at this time concern ourselves with the question of whether the trial court should have set aside the verdicts."

The justification for viewing the action of the lower court as the granting of a new trial with respect to the defendants against whom "inadequate" verdicts had been rendered does not apply to DePinto. The jury verdict was in his favor. The lower court had no alternative other than to enter judgment for DePinto for the reason that "where uncertainty arises, either from a conflict of testimony, or because the facts being undisputed, fair-minded men may honestly draw different conclusions from them, the question is not one of law, but of fact to be settled by the jury." *Hagan & Cushing Co. v. Washington Water Power Co.* (9 Cir.) 99 F. 2d 614, 617.

So far as DePinto is concerned, the action of the trial court was, in both form and substance, no more or less than the granting of Judgment N.O.V. The lower court had no jurisdiction to grant a new trial except in strict accordance with Rule 50(b) or Rule 59 of the Federal Rules of Civil Procedure. Plaintiff did not move for a new trial, and the trial judge lost jurisdiction to grant a new trial, on his own initiative, ten days after the entry of judgment. *Gilliland v. Lyons* (9 Cir.) 278 F. 2d 56. The jurisdictional limitation cannot be avoided by labeling or treating a Judgment N.O.V. as an order granting a new trial. The judgment was in no sense an interlocutory order. It was a final judgment which this Court had the power and duty to review under the provisions of Section 1291 of Title 28, U.S.C.

Where a Judgment N.O.V. has been erroneously granted and the successful party has not, in the alternative, asked for a new trial—or where the request for new trial has not been urged—then upon reversal by a court of appeals the case should be remanded to the lower court with instructions to enter judgment on the verdict.

Hanson v. Ford Motor Company (8 Cir.) 278 F. 2d 586.

Hansen v. Firestone Tire & Rubber Co. (6 Cir.) 276 F. 2d 254.

Vera Cruz v. Chesapeake & Ohio Railroad (7 Cir.) 312 F. 2d 330.

Edwards v. United States (6 Cir.) 140 F. 2d 526.

Bruin v. Tribble (4 Cir.) 238 F. 2d 12.

B. Change of Judge.

This cause was originally tried before the Honorable George H. Boldt, sitting with a jury, in March of 1960. With respect to the issue of merger, this Court, in a foot-

note to its opinion in *Niesz v. Gorsuch* (9 Cir.) 295 F. 2d 909,911, called attention to the failure of the trial judge to give careful consideration thereto. At the close of all of the evidence Judge Boldt refused to give effect to a jury verdict in favor of the appellant, DePinto, and granted judgment for the plaintiff N.O.V. He erroneously refused to recognize the verdict of the jury as having any binding effect. Appellant, DePinto, filed a Motion For New Trial raising numerous legal questions and also pointing out specific errors in the Findings of Fact entered by the lower court. (Tr. 361) The lower court apparently gave little, if any, consideration to the Motion, notwithstanding the fact that Finding No. 19(d) was contrary to the undisputed evidence. (Tr. 340; Ex. 5H)

After the judgment was reversed by this Court in Cause No. 17114 and the case remanded for further proceedings, the Honorable trial judge again failed to give objective consideration to the legal and factual questions raised by appellant, DePinto. At a pretrial conference held on March 9, 1962, Judge Boldt admonished attorneys for the defendants that they should not "go shopping" for another judge; that he intended to stay with the case until its conclusion. So far as known to DePinto and his attorneys, this caveat was wholly unprovoked.

DePinto moved that judgment be entered in his favor upon the jury's verdict and in the alternative demanded a trial by jury of all of the issues involved herein. (Tr. 1630) The Motion was summarily denied. (Tr. 1710) Notwithstanding DePinto's objections, Judge Boldt entered Supplemental Findings of Fact and Conclusions of Law wherein he failed to correct or modify his original Finding No. 19(d) which was contrary to the evidence. (Tr. 1712) In addition to again entering judgment

against DePinto in the amount of $314,794.19, Judge Boldt elected to include interest thereon from October 18, 1957, which had the effect of increasing DePinto's liability to the extent of approximately $100,000.00. (Tr. 1746)

After the remand of this case to the lower court following the first appeal, Gorsuch filed an action against Provident Security Life Insurance Company for the purpose of attempting to set aside the merger of United Security Life with Provident. In that case, Judge Boldt was persuaded to enter a default against Provident and a "Summary Judgment" setting aside the merger. In treating Provident in such a cavalier manner, Judge Boldt erred in at least four particulars. We refer to the Court to its opinion in *Provident Security Life Insurance Co. v. Gorsuch,* No. 18,307, entered on October 1st, 1963.

The Honorable George H. Boldt has been reversed twice in this case and once in the *Provident* case. The record clearly demonstrates the inability of Judge Boldt to view the affairs of United Security Life with that degree of judicial detachment and objectivity which should govern all actions of a trial judge. Further proceedings in this case should be heard before a judge designated by the Chief Judge of this Circuit pursuant to Section 292(b), Title 28, U.S.C.

U. S. v. Hatabley (10 Cir.) 220 F. 2d 666.

U. S. v. Ritter (10 Cir.) 273 F. 2d 30.

Respectfully submitted,
Herbert Mallamo
Evans, Kitchel & Jenckes
By Jos. S. Jenckes, Jr.
Attorney for Appellant,
Angus J. DePinto

APPENDIX C

In the United States Court of Appeals
For the Ninth Circuit

No. 18245

Order

ANGUS J. DEPINTO, HJALMAR B. LANDOE, FRANCIS I. SABO AND EDWIN B. PEGRAM, ELMER W. DUHAME, *Appellants*,

v.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, AND JOHN S. GORSUCH AND ALBERT J. DOIG, *Appellees*.

On Petitions for Rehearing

Before: BARNES, HAMLEY and JERTBERG, Circuit Judges

The petitions for rehearing of appellants Angus J. DePinto and Elmer W. Duhame are denied.

Stanley N. Barnes

Frederick G. Hamley

Gilbert H. Jertberg
United States Circuit Judges

APPENDIX D

Phoenix, Arizona, December 2, 1964; 1:30 o'clock p.m.

(The appearances were the same as before.)

THE COURT: Gentlemen, after careful reading of the cases, and I re-read a good many of them, and after a re-reading of the affidavit and the arguments, I feel that I have no other alternative but to arrive at this decision, and I will read it as I wrote it here:

The Court rules that the Affidavit of Bias and Prejudice filed in Case No. Civil 2974 Phoenix by Defendant Angus J. DePinto seeking to disqualify the Honorable George H. Boldt from presiding further as judge in this case be denied, and the Plaintiff's motion to strike the said Affidavit be granted, for the reasons that the said Affidavit is not sufficient, in that the Affidavit fails to show facts or reasons to indicate personal bias or prejudice on the part of the Honorable George H. Boldt against the Defendant Angus J. DePinto, and for the further reason that the Affidavit is not timely, in that virtually all of the same facts and reasons expressed in the Affidavit filed herein were previously raised and rejected by the Court of Appeals, and as to those facts and reasons not previously raised and later added to the Affidavit, the Court finds that these additional facts and reasons are insufficient to alter the Court's decision.

Now, basically I think that the cases do not indicate, at least to me, and *this is not part of the decision*, I am just commenting on it, do not indicate that merely because a judge makes an erroneous ruling, or rules against the parties, particularly in a case of this kind where apparently they were procedural matters involved, and as far as I can see that was not basically touched on the facts. But in any case I feel that where the Court makes

erroneous rulings, and they are reversed, I don't think this in and of itself, even if you add several of them together to warrant a sufficient showing under the statute and the decisions to indicate bias and prejudice, and I also think that since the matter was presented to the Ninth Circuit for all except that motion that is now pending, which really actually hasn't been determined yet anyway, as to just what the Court is or is not going to do, other than I guess the Court has indicated to you he is going to hear it, if the matter should come before him, I feel that their ruling on this foreclosed my in a sense finding differently from the Court of Appeals.

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(Emphasis supplied)